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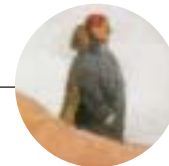
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We strive through public service
and professional excellence to
promote fairness and virtue
founded upon the rule of law.



A Song of Redemption

BY RICHARD G. WILKINS

CHARLES DICKENS' *short novella, A Christmas Carol, is a masterpiece of English literature revered by many for its central role in reviving (and reinventing) English (and American) Christmas traditions. Unknown to many, however, is that Dickens' "little 'Carol'" was conceived as "A Plea To The People Of England On Behalf Of The Poor Man's Child."* Underlying the fable of Ebenezer Scrooge and Tiny Tim is a biting critique of a society that dismissed humanity in the quest for economic efficiency. But Dickens' solution for this still ongoing tragedy was not the creation of judicially enforceable individual rights for Tim. Rather, the answer was a more intimate (and perhaps more necessary) focus on the communal responsibilities of Ebenezer.



F. Lee Jones



December 17, 1843, a slim red volume with gilt edges and hand-colored lithographs first appeared in London bookstalls. The little volume was Charles Dickens' masterpiece *A Christmas Carol*. The world—and Christmas—have never been the same.

Few readers 160 years later realize that this short book is perhaps responsible for saving the Christmas holidays from extinction. Following the English Civil War in 1642, the Puritans abolished the holiday.¹ Although the English monarchy was later restored, Christmas—with its carols, feasting, and warm good-heartedness—was not similarly refurbished and went into further decline with the coming of the Industrial Revolution.² Indeed, G. K. Chesterton, in his introduction to the 1924 edition of *A Christmas Carol*, observed, “If a little more success had crowned the Puritan movement of the seventeenth century, or the Utilitarian movement of the nineteenth century,” the old holiday traditions would “have become merely details of the neglected past, a part of history or even archaeology. . . . Perhaps the very word *carol* would sound like the word *villanelle*” (italics added).^{3,4}

But English Christmas traditions survive—and have been transplanted to America—because of what Dickens fondly called his “little ‘Carol.’” Michael Hearn, notes that Dickens must be “credited with almost single-handedly reviving the holiday customs.”⁵ Hearn, in fact, relates that by the time of his death, “Dickens had already secured so sure a place in the mythology of the holiday that a story circulated about a little costermonger’s girl in Drury Lane who, on hearing of his funeral, asked, ‘Dickens dead? Then will Father Christmas die too?’”⁶

Considering the book’s historical setting and its effect on English and American

Christmas traditions, it is fascinating that when he took pen in hand, Dickens did not have the restoration of “those golden days of yore, when Christ’s Mass was a high day,”⁷ as his primary goal. Rather, he wrote the book to strike a blow against child labor and a suffocating lack of education among the poor. Indeed, some months prior to the publication of the *Carol*, Dickens had promised to write a pamphlet entitled “A Plea To The People Of England On Behalf Of The Poor Man’s Child.”⁸ The *Carol* became his plea.

The plea was sorely needed in 1843. The conditions of the poor—particularly the children of the poor—were intolerable. Dickens was incensed by reported descriptions of parish orphans and other children of the destitute, employed generally at seven years, some as young as three, who were brutalized, ill-fed, and ill-clothed during their 15- to 18-hour workdays. Equally appalling was the uniform lack of educational opportunities afforded the poor. In early 1843, Dickens assisted a wealthy friend and philanthropist in distributing funds to the Ragged Schools of Field Lane, Holborn.⁹ These schools existed to provide some meager training, but even this endeavor seemed nearly futile. As Dickens wrote:

*To gain [the students’] attention in any way . . . is a difficulty, quite gigantic. To impress them, even with the idea of a God, when their own condition is so desolate, becomes a monstrous task. To find anything within them . . . to which it is possible to appeal, is at first, like a search for the philosopher’s stone. . . . My heart so sinks within me when I go into these scenes, that I almost lose the hope of ever seeing them changed. Whether this effort will succeed, it is quite impossible to say.*¹⁰

On October 5, 1843, as Dickens was formulating his social tract attacking child labor and ignorance, he was invited to give an oration at a fund-raising soirée for the Manchester Athenaeum, a charitable institution for the working class. Dickens began his oration by congratulating the people of Manchester for creating the Athenaeum, a place where “the immortal mechanism of God’s own hand, the mind, [would not be] forgotten in the din and uproar [created by] the whirl and rattle of machinery.”¹¹ The high purpose of the Athenaeum, Dickens stated, was to provide “a little learning” and, therefore, “self respect.”

*[T]his I know, that the first unpurchaseable blessing earned by every man who makes an effort to improve himself in such a place as the Athenaeum is self-respect—an inward dignity of character which once acquired and righteously maintained, nothing, no, not the hardest drudgery, nor the direst poverty, can vanquish. Though [a man] should find it hard for a season even to keep the wolf of hunger from his door, let him but once have chased the dragon of ignorance from his hearth, and self-respect and hope are left him.*¹²

Thus, according to Dickens, once the “dragon of ignorance” was “chased . . . from [the] hearth,” even the cold, hard specter of want would recede and be replaced by “self-respect and hope.” But how was such an end to be achieved? By educating each individual that he or she is part of an interdependent community. The more a man learns: the better, gentler, kinder man he must become. . . . Understanding that the relations between [men] involve a mutual duty and responsibility, he will discharge his part of the implied contract cheerfully, faithfully, and honourably; for the history of every useful life warns him to shape his course in that direction.¹³



Dickens, in short, argued that society would improve and mankind would flourish, not when men and women were imbued with sufficient rights to facilitate full autonomy, but rather when educated members of the polity recognized the reciprocal benefits flowing from mutual obligations.

Newspaper accounts report that the speech was greeted with shouts and a thunderous ovation.¹⁴ That night as Dickens left the Trade Hall, his “mind still burning with thoughts of Ignorance and Want and the necessity of throwing himself upon the truthful feelings of the people,”¹⁵ he determined the form in which he would deliver his “Plea To The People Of England.” He would write the *Carol*. Dickens spent the night in Manchester

pacing his room, and upon returning to London he “wept and laughed and wept again, and excited himself in a most extraordinary manner in the composition, and thinking whereof he walked about the black streets of London, fifteen and twenty miles many a night, when all sober folks had gone to bed.”¹⁶

The rudimentary plot came from Dickens’ earlier writings.¹⁷ The prototype was his short story “The Goblins Who Stole A Sexton,” in which goblins reveal scenes of Christmas cheer to an “ill-tempered grave digger named Gabriel Grubb.”¹⁸ However, unlike the goblin story, *A Christmas Carol* is infused with the communitarian message and hope in mankind so forcefully delivered at the Athenaeum. Although Scrooge and



*Scrooge crept towards it, trembling as he went;
and following the finger, read upon the stone of the
neglected grave his own name, EBENEZER SCROOGE.*

Tiny Tim dominate the tale, they are but lenses through which Dickens focuses his plea to the people of England.

Scrooge is initially presented in broad, melodramatic strokes:

*Oh! But he was a tight-fisted band at the grindstone, Scrooge! a squeezing, wrenching, grasping, scraping, clutching, covetous old sinner! Hard and sharp as flint, . . . and solitary as an oyster. The cold within him froze his old features, nipped his pointed nose, shrivelled his cheek, stiffened his gait; made his eyes red, his thin lips blue.*¹⁹

But Scrooge is more than a cardboard cutout.

For all his hard-heartedness, he was not an unfair man or employer. Contrary to many contemporary retellings, Scrooge is never portrayed as taking an undue advantage. He paid Bob Cratchit 15 shillings a week—the common and customary wage for clerks at the time. Moreover, Scrooge's grumbles regarding Bob's request for Christmas day off were hardly extraordinary: in 1843 most workers were denied the day off. Thus, once past the disagreeable adjectives, Scrooge is presented as no more (but no less) than the ultimate rational economic man: the definitive businessman who fixes the value of all human relationships by a single measure—profit.

As a result, when Scrooge's nephew hails him on Christmas Eve with a hearty, "[M]erry Christmas, uncle! God save you!" Scrooge's reply is a muttered, "Bah! Humbug."²⁰

"Christmas a humbug, uncle!" said Scrooge's nephew. "You don't mean that, I am sure."

"I do," said Scrooge. "Merry Christmas! what right have you to be merry? what reason have you to be merry? You're poor enough."

"Come, then," returned the nephew gaily. "What right have you to be dismal? what reason have you to be morose? You're rich enough."

Scrooge having no better answer ready on the spur of the moment, said, "Bah!" again; and followed it up with "Humbug."

"Don't be cross, uncle," said the nephew.

"What else can I be . . . when I live in such a world of fools as this? Merry Christmas! Out upon merry Christmas! What's Christmas time to you but a time for paying bills without money; a time for finding yourself a year older, and not an hour richer; a time for balancing your books and having every item in 'em through a round dozen of months presented dead against you? If I could work my will . . . every idiot who goes about with 'Merry Christmas' on his lips, should be boiled with his own pudding, and buried with a stake of bolly through his heart. He should."²¹

Because his only goal is finding himself several "hours richer" at the end of Christmas day, Scrooge disregards any broader communal obligations. But mere economic efficiency does not blind his nephew. When challenged to explain "what good" Christmas had ever done him, the nephew replies:

There are many things from which I might have derived good, by which I have not profited, I dare

*say . . . Christmas among the rest. But I am sure I have always thought of Christmas time, when it has come round . . . as a good time: a kind, forgiving, charitable, pleasant time: the only time I know of, in the long calendar of the year, when men and women seem by one consent to open their shut-up hearts freely. . . . And therefore, uncle, though it has never put a scrap of gold or silver in my pocket, I believe that it has done me good, and will do me good; and I say, God bless it!"*²²

Scrooge, of course, will have none of it, and after taking his "melancholy dinner in his usual melancholy tavern; and having read all the newspapers, and beguiled the rest of the evening with his banker's-book, went home to bed."²³ There, stripped of his accounts, pens, rulers, and other outward symbols of economic success—clothed only in his dressing gown, slippers, and a nightcap—he confronts the end result of an independent, profitable, but isolated life: the ghost of his former partner, Jacob Marley.

Scrooge, the utilitarian, first asserts that Marley is nothing more than indigestion or a bit of swallowed toothpick.²⁴ But after a fearful wail from the ghost, Scrooge drops to his knees for a learning moment.

"Man of the worldly mind!" [said] the Ghost, "do you believe in me or not?"

"I do," said Scrooge. "I must. But why do spirits walk the earth, and why do they come to me?"

"It is required of every man," the Ghost returned, "that the spirit within him should walk



*familiar with one old ghost, in a white waistcoat, with a monstrous iron safe attached to its ankle, who cried piteously at being unable to assist a wretched woman with an infant, whom it saw below, upon a door-step. The misery with them all was, clearly, that they sought to interfere, for good, in human matters, and had lost the power for ever.*²⁶

The sequence—and consequence—of the spirits that thereafter visit Scrooge are well known. From the Ghost of Christmas Past, who appears in the ambiguous form of a young boy (or is it an old man?), Scrooge learns, as he watches himself dismiss love as “an unprofitable dream, for which it happened well that [he] awoke,”²⁷ that commitment may be more important than self-regard. From the Ghost of Christmas Present, garbed in green and resplendent in holly, Scrooge discovers that family (and community) are more sustaining than a bankbook: Bob Cratchit, despite poverty, toasts his hearth and hold with a hearty “Merry Christmas to us all, my dears. God bless us!”²⁸ Tiny Tim, in his famous echo of that toast, reinforces the essential interdependence of all humanity: “God bless us, every one!”²⁹

Here, at the midpoint of the tale, and following Tiny Tim’s simple but eloquent toast, Dickens delivers the same message he presented at the Manchester Athenaeum. As the Ghost of Christmas Present departs, he brings forth the twin demons of Want and Ignorance.³⁰ Scrooge, faced with the wan specters of the Girl Want and the Boy Ignorance is warned, “Beware them both, and all of their degree, but most of all beware this boy, for on his brow I see that written which is Doom, unless the writing be erased.”³¹

The import of this pivotal warning is brought forcibly to Scrooge’s—and to our—attention by the last Spirit, the Ghost of Christmas Yet To Come. That specter, draped in black, forces all of us to confront the consequences of a solitary, independent life: Scrooge’s corpse is plundered by thieves who, like himself, pursue their own utilitarian ends. On the other hand, Tiny Tim, who was part of the unprofitable but intensely interdependent community known as the Cratchit family, is mourned with a more potent (and lasting) mixture of sorrow and joy:

abroad among his fellow-men and travel far and wide; and if that spirit goes not forth in life, it is condemned to do so after death. It is doomed to wander through the world . . . and witness what it cannot share, but might have shared on earth, and turned to happiness.”

“You are fettered,” said Scrooge, trembling. “Tell me why?”

“I wear the chain I forged in life,” replied the Ghost. “I made it link by link, and yard by yard. . . . Is its pattern strange to you? . . . Or would you know . . . the weight and length of the strong coil you bear yourself?”

“But you were always a good man of business, Jacob,” faltered Scrooge. . . .

“Business!” cried the Ghost. . . . “Mankind was my business. The common welfare was my business; charity, mercy, forbearance, and benevolence, were,

*all, my business. The dealings of my trade were but a drop of water in the comprehensive ocean of my business! . . . Why did I walk through crowds of fellow-beings with my eyes turned down, and never raise them to that blessed Star which led the Wise Men to a poor abode? Were there no poor homes to which its light would have conducted me!”*³²

At the conclusion of this interview, the departing Marley presents Scrooge with a vision of the opportunities lost by a self-centered focus:

The air was filled with phantoms, wandering hither and thither in restless haste, and moaning as they went. Every one of them wore chains like Marley’s Ghost. . . . Many had been personally known to Scrooge in their lives. He had been quite

"And I know," said Bob, "I know, my dears, that when we recollect how patient and how mild he was; although he was a little, little child; we shall not quarrel easily among ourselves, and forget poor Tiny Tim in doing it."

"No, never, father!" they all cried. . . .

"I am very happy," said little Bob, "I am very happy!"³²

In contrast to the sustaining strength flowing from Tiny Tim's passing, all that is left of Scrooge and his economic success is a barren graveyard. Faced with this reality, Ebenezer Scrooge at last understands that a meaningful life requires more than untrammelled pursuit of individual ends:

The Spirit stood among the graves, and pointed down to One.

"Before I draw nearer to that stone to which you point," said Scrooge, "answer me one question. Are these the shadows of the things that Will be, or are they shadows of the things that May be, only?"

Still the Ghost pointed downward to the grave by which it stood.

"Men's courses will foreshadow certain ends, to which, if persevered in, they must lead." . . . "But if the courses be departed from, the ends will change. Say it is thus with what you show me!"

The Spirit was immovable as ever.

Scrooge crept towards it, trembling as he went; and following the finger, read upon the stone of the neglected grave his own name, EBENEZER SCROOGE.

"Am I that man . . . ? No, Spirit! Oh, no, no! . . . I am not the man I was. I will not be the man I must have been. . . . Why show me this if I am past all hope? . . . Good Spirit, intercede for me! Assure me that I may yet change these shadows you have shown me, by an altered life! I will honour Christmas in my heart, and try to keep it all the year. I will live in the Past, the Present, and the Future. The Spirits of all Three shall strive within me. I will not shut out the lessons that they teach. Oh, tell me I may sponge away the writing on this stone!"³³

Scrooge, of course, does change. And Tiny Tim does not die. But there is more to this happy ending. There is a prescription for the evils that besought England in 1843 and, I suggest, for the similar evils that plague 2002.

Dickens wrote *A Christmas Carol* during the heyday of England's infatuation with laissez-faire liberty. Scrooge is not merely an

isolated miser, he is the personification of the social ills that produced the miser. As Michael Hearn has written:

*Scrooge does not merely express the ideas of popular political cant, . . . but also his character is motivated by its hardhearted facts.*³⁴

Scrooge's shortcomings, therefore, were essentially those of English society. By showing how Scrooge ultimately overcame those failings, Dickens marked a way out for England as well. Scrooge's transformation taught a utilitarian world, obsessed with the efficient creation and maintenance of wealth, how it could once again gain sight of the human soul. The *Carol* taught that pursuit of liberty—without more—makes money, but not a decent society.

Some may suppose that this economic message is all there is to the *Carol*. There is more. The essential flaw in Ebenezer Scrooge—and in English society—was not that he (or it) valued economic liberty. He, and that society, simply valued that liberty too much. Economic liberty is a good thing. But it is not the *only* thing. Scrooge's focus on economic liberty as the only legitimate social value resulted in his bitter isolation rather than Bob Cratchit's friendly hearth.

America in 2002 is replicating an analogous evil. We are, I fear, walking the same path as Ebenezer Scrooge. We no longer lay our offerings on the altar of economic liberty worshipped by old Ebenezer. No, our current infatuation with self-centeredness is more sophisticated: we idolize not economic efficiency but rather autonomy and individual "rights." This modern focus on isolation and unfettered liberty, however, does little to distance us from Mr. Scrooge.

Old Ebenezer was not only the ultimate economic man; he was also the ultimate autonomous rights-bearer. Talk about autonomy! Talk about rights! He had both—and to spare. According to Dickens, even *nature* could not touch him. "External heat and cold had little influence on Scrooge. No warmth could warm, nor wintry weather chill him."³⁵

Scrooge also had the same answers that are given, in only slightly more palatable form, by modern civil liberty utilitarians. When confronted by charitable solicitors for the poor, Scrooge rebuffs them with the

observation that he pays his taxes to support the prisons and the poorhouses and that "those who are badly off must go there."³⁶ To the simple invocation of human pity that "[m]any can't go there; and many would rather die," Scrooge comes forth with the classic utilitarian reply: "If they would rather die, . . . they had better do it, and decrease the surplus population."³⁷

This same answer, now draped in the all-too-enticing garlands of autonomy and individual liberty, is given with distressing frequency by the modern world. We once cherished even the most marginal members of our communities simply because they were human and alive—and we sanctified this norm with the force of law. Unborn children, the aged, the elderly, and the infirm—without exception or legal, medical, economic, or philosophical quarrel—could rely upon the bedrock rule that all human life is sacred. But no longer. No more. Modern due process jurisprudence, cloaked in the rhetoric of rights, all too often gives the same answers as old Ebenezer³⁸: the marginal members of this society had better die, and decrease the surplus population.³⁹ Dickens was clearly incensed by such reasoning. As the Ghost of Christmas Present chides Scrooge: "Oh God! To hear the insect on the leaf pronouncing on the too much life among his hungry brothers in the dust."⁴⁰

Thus, while the modern solution for troubled pregnancies and the difficulties associated with age, illness, and despair is dressed in more fashionable garb than Scrooge's harsh rhetoric, the message is the same. Modern society, when confronted with social ills closely analogous to the sweatshops and ragged schools that prompted Dickens' "Plea To The People Of England," has tersely responded that such matters are individual problems that must be resolved by the individual sufferers. Not only that, society itself has no business intervening to protect and sustain life. How like old Ebenezer.

Dickens gave an answer for the ills engendered by untrammelled economic liberty in 19th-century England. The same answer goes a good part of the way toward solving the problems of today. As Dickens informed the Athenaeum and reiterated at length in the *Carol*, "relations between



RICHARD G. WILKINS

“Mr. Scrooge”

by Lovisa Lyman

When law professor Richard Wilkins first auditioned for the role of Ebenezer Scrooge in 1984, he was a baby-faced 32-year-old law professor. Theater owner Ruth Hale told him he was far too young to play the part convincingly, but he was the only actor who auditioned who could do a believable British accent, so he got the job. The Hales brought in a Hollywood makeup artist to “age” Wilkins’ youthful face for the role. “She made the face I have now,” quips Wilkins. For widespread fans who make the show a regular part of their holiday celebration, Wilkins has become the consummate Bah Humbug!

Drama has always been dear to Wilkins and his family. He began his undergraduate studies at BYU as a drama major, but after one semester he realized he would have a hard time supporting a family as an actor. So he switched to journalism and persisted to graduation. During his studies he happened to interview Rex Lee about the new law school. Lee observed, “You seem like a bright young man. Why don’t you come to law school?” Wilkins

remembered the invitation after he graduated in journalism and discovered that the only job he could find was as the editor of four weekly newspapers in central Utah, where he earned a princely \$425 a month. To avoid starvation he took the LSAT and began law school the next fall with the idea that he would bring all his training together and study entertainment law.

To prepare for that goal, Wilkins clerked with firms in Los Angeles during summers. Upon graduation, however, the offer of a clerkship for Judge Robert Ainsworth in New Orleans altered his plans. Following the clerkship he worked for Vinson and Elkins in Washington, D.C., for a year. At that point, he was asked by Rex Lee—who was now solicitor general—to serve as one of his assistants.

Wilkins' first court argument was before the U.S. Supreme Court, and he freely admits that all his drama experience failed him. "It was the worst performance in the annals of United States history." His own grandfather, who attended, said, "Rick, it'll get better." Apparently it did. After four years on the job, Justice Burger, who had witnessed the first performance, sent Wilkins a treasured note: "You've become a very fine appellate advocate."

When Wilkins left Washington, he made another hard decision. Vinson and Elkins in Houston offered him a job heading up their appellate division. Wilkins opted to return to Utah and teach at the BYU Law School. That's when the Hales heard him give a high council talk in their ward and told him, "You have pretty good presentation," and asked him to try out for the opening play at their new theater.

Between 1984 and 1999, Wilkins didn't miss a performance of *A Christmas Carol*, appearing as Scrooge a total of 502 times at Salt Lake's original Hale Theater. His wife, Melany, joined him as Mrs. Cratchit for most of those performances, and each of their four children had parts when they were old enough. He continues his much-applauded role at the new Hale Center Theater for the 2002 season.

[men] involve a mutual duty and responsibility," and as a result we must discharge our implied obligations toward each other "cheerfully, faithfully, and honourably; for the history of every useful life warns [us] to shape [our courses] in that direction."⁴¹

Ebenezer Scrooge learned that he could not live in isolation from Tiny Tim. Since, like Ebenezer, we cannot escape each other, our only hope is an enlightened understanding of our mutual, communal obligations. As Ebenezer, we must vow to live in the past, present, and future and not forget, as Marley's Ghost warned, that all of mankind, individual liberty notwithstanding, "is our business." The common welfare, charity, mercy, forbearance, and benevolence are all our business.

In 1843 Charles Dickens set out to write "A Plea To The People Of England On Behalf Of The Poor Man's Child." He did not complete that effort, but the *Carol*, in his own words, brought the message down "like a sledge hammer [with] twenty times the force—twenty thousand times the force—I could exert by following out my first idea."⁴² It does so because the *Carol* is a song of redemption. Scrooge's resolution to live in the past, present, and future, along with his pledge to "honour Christmas in my heart and try to keep it all the year" has the power to redeem not only Ebenezer, but all those who make the same vow.⁴³

*Scrooge was better than his word. He did it all, and infinitely more; and to Tiny Tim, who did NOT die, he was a second father. He became as good a friend, as good a master, and as good a man, as the good old city knew, or any other good old city, town, or borough, in the good old world. . . . May that be truly said of us, and all of us! And so, as Tiny Tim observed, God Bless Us, Every One!*⁴⁴

ENDNOTES

- 1 Michael P. Hearn, *Introduction* to CHARLES DICKENS, *THE ANNOTATED CHRISTMAS CAROL: A CHRISTMAS CAROL 2* (Michael P. Hearn ed., 1989 ed.).
- 2 *Id.* at 3.
- 3 A villanelle is a verse form running on two rhymes and consisting of five tercets and a quatrain.
- 4 G. K. Chesterton, *Introduction* to CHARLES DICKENS, *A CHRISTMAS CAROL* (1924 ed.) quoted in Hearn, *supra* note 1, at 3.

- 5 Hearn, *supra* note 1, at 1.
- 6 *Id.*
- 7 *Id.* at 3.
- 8 *Id.* at 6–7.
- 9 *Id.* at 7.
- 10 Charles Dickens, Speech presented at the First Annual *Soirée* of the Athenaeum: Manchester (Oct. 5, 1843), in *THE SPEECHES OF CHARLES DICKENS* 44, 45–46 (K. J. Fielding ed., 1960).
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at 49.
- 14 Hearn, *supra* note 1, at 9.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.* at 9–12.
- 18 *Id.* at 12.
- 19 CHARLES DICKENS, *A CHRISTMAS CAROL* (1843 ed.), reproduced in *THE ANNOTATED CHRISTMAS TALE: A CHRISTMAS TALE* 56, 58–60 (Michael P. Hearn, ed., 1989 ed.).
- 20 Dickens, *supra* note 19, at 61.
- 21 *Id.* at 61–62.
- 22 *Id.* at 62–63.
- 23 *Id.* at 69.
- 24 *Id.* at 76–77.
- 25 *Id.* at 77–79.
- 26 *Id.* at 81.
- 27 *Id.* at 103.
- 28 *Id.* at 124.
- 29 *Id.*
- 30 *Id.* at 141–142.
- 31 *Id.* at 142.
- 32 *Id.* at 158.
- 33 *Id.* at 159–60.
- 34 Hearn, *supra* note 1, at 42.
- 35 Dickens, *supra* note 19, at 60.
- 36 *Id.* at 65.
- 37 *Id.*
- 38 *Id.* at 49.
- 39 Letter from Charles Dickens to Dr. Smith, (March 10, 1844).
- 40 Dickens, *supra* note 19, at 124.
- 41 Dickens, *supra* note 10, at 49.
- 42 Letter from Charles Dickens to Dr. Smith, (March 10, 1844).
- 43 Dickens, *supra* note 10, at 49.
- 44 Dickens, *supra* note 10, at 49.

ART CREDITS

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lawyers

by H. Reese Hansen

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who made a

The following address was given at the commencement exercises

difference

of the University of Utah College of Law on May 19, 2001.

in my life



VICE PRESIDENT CHAPMAN and university officers, Dean Matheson, distinguished faculty, graduates, families, and friends. It is an honor to be here with you celebrating the graduation of the law school class of 2001. Being here, at my alma mater, makes this an especially wonderful day for me. I admit at the outset that I am under no illusion that my remarks will be the most memorable part of today for any of you, especially the graduates. I frankly state that I did not remember who the speaker at my graduation was until my wife found a copy of the program among our scrapbooks two weeks ago. I have no idea what he said, although I am reasonably sure it was important. But this is a day primarily for congratulations, celebration, and thanksgiving. Graduates, this is the day long looked forward to by your parents. Perhaps now, they hope, there will be some return on their investment in you—maybe a will or a contract or deed or *something*. Spouses, children, and friends look forward to the return of your cheery temperament, more frequent visits, and a regular payday. I extend my warmest congratulations to all the graduates and to families and others who have supported them throughout their law school years.

Twenty-nine years ago I graduated from this law school. My wife, Kathryn, who is here with me this morning, was there on that day with our four little boys. We had decided to go to law school several years after graduating from Utah State University. I still remember vividly, even after these nearly 32 years, my first day in law school. I was a young father with three children, from a little farm and railroad town in the northernmost reaches of Utah, unsure of anything about law school; but I wanted to become a lawyer. Because I had been out of college for five years, I was a bit older than all but one or two of my classmates, and I didn't know a single person there. In the next weeks I became sure of one thing about law school: every single living, breathing human being in my class was at least twice as smart as I was.

Like most students, I initially found the Socratic Method intimidating, if not humiliating. For those of you who have not experienced law school, the Socratic Method is a manner of teaching where students are randomly called upon to stand and describe and explain things under persistent questioning from the professor. The Socratic Method is also the reason that law school is the only place where YOU LEARN TO HATE YOUR OWN NAME. In law school, students struggle as they learn the meanings of a whole new vocabulary of legal jargon, like *stare decisis*, which is Latin for "we stand by our past mistakes." The com-

petitiveness of law school and the fear of failure can create debilitating anxieties in students. My first-semester grades were four F's and a D. The dean called me into his office and said, "Kid, you've got to stop spending all your time on one subject." (See James D. Gordon III, "Humor in Law Teaching," *Clark Memorandum*, Spring 1991, pp. 2–6.)

Seriously, I have often reflected on the fact that it was here at the University of Utah Law School that my real education began. I will always remember with great fondness the teachers I studied under and the marvelous education I received. I treasure the friendships that were forged among classmates here. A group of about eight of us who studied together through much of law school still get together from time to time for lunch. In a show of the truest of true friendships, they even once came to Provo! (But only if I paid the bill, which I was glad to do, just so they could each have the personally enriching experience of being in Utah County for two hours.) Two of my study-group partners have worked on the faculty with me at BYU, and several others have taught part-time at the [BYU] Law School. Some of the greatest friendships of my life were formed in law school, and I dare to say it will be the same for today's graduates.

Coming back to speak at your graduation has caused me to reflect on my life in the law and what I have learned in it that may be helpful to you. I was reminded of the advice given by a second-year law student to an anxious entering first-year student who had asked for suggestions on coping in law school. After some reflection came the counsel: "If I had that first year to do over again, I would study less." The new student's spirits rose, as you can well imagine, because he had heard the usual horror stories about that first year of law school. "I would study less," the second-year student went on, "and think more."

I believe that is not only sound advice for law school but—more relevantly for today's graduates—sound advice for one's entire legal career. Unfortunately, in law, as in life, there is little need to think just to get by. But as Socrates wisely opined that the unexamined life is not worth living, so too one's life, especially in the profession that our graduates are entering today, should

remain—in a constructive, positive spirit—under the gentle watch of a careful eye. Like Nora in Ibsen's enduring play *A Doll's House*, we have an obligation to come to know ourselves for what we really are.

And so, graduates, as you stand at an important crossroads of your life, I have concluded to speak briefly about two great lawyers I have had the privilege of knowing well, whose lives have made an important difference in mine, and who I believe are worthy models to consider as you think about what it is that you are going to become in your life as a lawyer.

The first of these great lawyers is Sam Thurman, my law school dean. I will always remember the first time I met him. It was in the summer of 1969, and I was working in a good job in Salt Lake City. But my wife and I had decided that for our family it would be a wise thing for me to go back to school and become a lawyer. That way, we reasoned, we could choose where we wanted to live, and we would not be subject to corporate whims to move our family from place to place. I didn't know anything about getting into law school, and so I did what I have since learned everybody who wonders about law school does—I called the dean and made an appointment.

I did not know it at the time, but Dean Thurman was a very prominent figure in American legal education. He was a renowned legal educator who had come from the Stanford Law School faculty to be the dean of the law school at the University of Utah. Among a long list of other significant accomplishments, in 1962 (the year he came to the University of Utah Law School), Dean Thurman served as president of the Association of American Law Schools, which is the most prestigious position anyone can hold in the American legal academy.

Dean Thurman also served as chair of the American Bar Association's section of Legal Education and Admissions to the Bar and was influential in establishing standards for accrediting law schools. Additionally, he served as president of the National Order of the Coif. While he lived in California, he was a member of the California Law Revision Commission and was a director of the National Legal Services Corporation in the early days of public support for legal services for the poor.

What I remember about that first meeting and every other encounter I had with Dean Thurman in and after law school was his dignified manner and genuine kindness and his attentive interest in me as a student and as a person. It was my good fortune to take torts courses from Dean Thurman. He had a brilliant mind and was a first-rate scholar, and he was an excellent teacher who effectively used humor as a teaching tool. I think it was from him that I first got the notion that just maybe I could succeed in law school.

Dean Thurman made large contributions to legal education, especially at this law school. He was an accomplished scholar in subjects ranging from torts to constitutional law, the legal profession, and tax. Because of his expertise he was called upon many times to provide leadership in the profession and in legal education, which he always did because of his love of our legal institutions. Although he was very prominent and highly regarded, he was not preoccupied with himself nor did he require special privileges. He had a way of making you feel important to him. He was utterly decent in every way. Even while I was a student and always after that, I felt that Sam Thurman was my friend.

In a 1996 memorial tribute to Dean Thurman, Professor John J. Flynn described the dean as "an elegant, distinguished, and gentle man to all who met him. Possessed of an outgoing, friendly, and warm personality, Sam Thurman was a natural teacher and an effective leader who led by example." In concluding his tribute Professor Flynn states, "It is a reflection of the truly decent man we all call Sam, a teacher and academic leader who left his students and the institutions and organizations he became associated with much better off than where he found them. He did so by virtue of his own good judgment and unique ability to instill good judgment in his students, colleagues, and all those who had the good fortune to know the gentle man we call Sam" (AALS Proceedings 1996, p. 175, et seq.).

The second of the great lawyers who made a difference in my life was Rex Lee.

I first met Rex in 1972 while I was a 30-year-old, third-year law student at the University of Utah Law School. Rex was a 36-year-old dean of a newly announced, but not yet opened, law school at BYU. He was

in Salt Lake City, appropriately enough, getting advice from Dean Sam Thurman. Dean Thurman invited some students to meet Rex, and I was one of them. Our meeting that day was not much more than a greeting, as I recall. Little did I realize that this young lawyer/dean from Arizona would become an important player in my life. Indeed, because of him, my professional life would become nothing like I had envisioned it would be at the time I decided to go to law school. I became a law teacher primarily because of Rex's encouragement.

Rex was a superbly skillful lawyer. Not long after Rex passed away, the Committee of the National Association of Attorneys General held its annual meeting in Washington, D.C. All 50 state attorneys general attended the meeting, which was held at the Supreme Court. During a question-and-answer period, Justice David Souter was asked how advocacy before the high court had changed in recent times. Justice Souter paused for a moment, then answered: "Well, I can tell you that the biggest change by far is that Rex Lee is gone. . . . he is the best lawyer this justice ever heard plead a case in this court. Rex Lee was born to argue tough cases of immense importance to this nation. He set new standards of excellence for generations of lawyers and justices. No one thing has happened to change the nature of advocacy of this court which has had as much impact as the loss of that one player." (From talk delivered by Utah Attorney General Jan Graham at the J. Reuben Clark Law School, 28 February 1998.)

Rex was the consummate "lawyer's lawyer." He knew the law. He understood the law. Most important, he respected the law. Rex would say, "It is not enough to do the right thing. You must do the right thing in the right way." (Quoting Richard Wilkins, *Clark Memorandum*, Spring 1996, p. 4.)

At the conclusion of his tenure as solicitor general of the United States, in reflecting on the severe criticism he had so often received from conservative politicians, whose causes he refused to carry to the Supreme Court, Rex said, "There has been a notion that my job is to press the administration's policies at every turn and announce true conservative principles through the pages of my briefs. It is not. I'm the Solicitor General, not



the Pamphleteer General.” (From the *New York Times*, March 13, 1996, obituary by David Binder, Section B; Page 9; Column 1.)

When Rex was asked to be president of Brigham Young University following his tenure as solicitor general, he requested permission to try cases before the Supreme Court in his spare time. He posited, “If I were a concert violinist, would you expect me to give up the violin?”

Aside from his gifts as an advocate, perhaps the most easily observable personal quality in Rex’s unusual success was his ability to make every person he met feel immediately that he or she had been brought into the inner circle of Rex’s closest personal friends.

After Rex was twice stricken with cancer and later with peripheral neuropathy, his physical strength and abilities were dramatically reduced. He was in constant pain

have good motives or to be on the “right” side of an issue. Both Sam and Rex were diligent and thorough in their lifelong study of the law. They each spent the effort required to become truly expert in it.

Third, each of them had a genuine interest in other people. They were not self-centered; rather, they displayed kindness and concern in all their interactions with others. They carried themselves with dignity and treated everyone else with dignity. They had a quiet self-confidence rooted in a wholeness of person. These were men who really were the kind of person they each seemed to be.

Finally, I found in each of them a consistent attitude of optimism and gratitude. Every life has its challenges, and certainly Sam Thurman’s and Rex Lee’s lives had their share of difficult times and bitter disappointments. But each of them choose to

ment to the Supreme Court of Utah I ever heard. In that case he represented a derelict woman in a divorce matter. Mr. Rice told the court, “My client, Mrs. McDonald, is a drunk. She has been abandoned by her husband, her family, her church and everyone except her lawyer. I took her case to keep her from being taken advantage of.” He was a deliverer, and he received a pittance for his work.

The most important role of a lawyer is to help and heal. Please remember in your dealing with each other, indeed with everyone you see, to exemplify civility, grace, and integrity. In the end, your self-worth will not be measured by your law school grade point average or class standing, by your beginning salary or, indeed, the total of your lifetime earnings, or by how soon you become a partner. Self-worth is measured by the manner in which you have served others.

We, your families and friends and your teachers take our hats off to you today for what you are and for what you may become.

and had difficulty walking, holding a pen, or eating. Consistent with his tremendous optimism and remarkable grace, however, when asked how he coped with his imposed limitations, his response was: “I stay focused on the abundant things I can still do and the generous blessings which I enjoy.” He further quipped, “I’ll have you know there are five illnesses I don’t have.”

There are some important parallels in the lives of these two great lawyers which are worthy of our notice and emulation.

First among them I note that each of them had a great respect for law, for lawyers, and for the legal system. They understood that so much that is important to our society depends upon respect for the legal profession and system of laws. Each of them, in their own way, found ways to personally contribute by serving the profession and honoring our legal system.

Next, they were each completely competent in their understanding of the law. They knew that it was not enough just to

bear their burdens with grace and patience and to move on in gratitude for the blessings they readily acknowledged.

As you enter the legal profession, I remind you that you are part of one of the noblest professions. Seek to serve its highest purposes. Because of your training, you will have a lifetime of opportunities to provide sacred, healing service to others.

I am reminded of an incident President James E. Faust, a gifted attorney who became president of the Utah State Bar before becoming a General Authority of The Church of Jesus Christ of Latter-day Saints, told in a meeting of lawyers in Washington, D.C. He told this story from early in his legal career about a senior partner in his law firm:

One of your challenges will be to make economic rewards your last consideration rather than your first. This is hard to do. I was taught this by my senior associate, John D. Rice, . . . who was one of the ablest and most successful practitioners at the Utah Bar. He gave the most eloquent oral argu-

And remember that we—all of us including parents, spouses, teachers, and family—have great expectations of you who graduate today. John Trebonius used to take off his hat on entering the classroom when it was the Germanic custom of the day for professors to keep them on. When asked why, he said, “These [students] will some day be [grown], and I do not know but that there sits among them one who will change the destiny of mankind. I take off my hat in deference to what they may become.”

James Monroe said, “The question to be asked at the end of an educational step is not ‘What has the student learned?’ but ‘What has the student become?’” We, your families and friends and your teachers take our hats off to you today for what you are and for what you may become. I encourage you to dream big and to live big. Thank you.

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The Lord taught us that eternal life, or exaltation, is God's greatest gift to man (D&C 14:7). In fact, the Lord tells us that it is not only His greatest gift to us, but it is His greatest work and his glory—to bring to pass the immortality and eternal life of man (Moses 1:39). Interestingly, in the 1835 first edition of the Pearl of Great Price, that same scripture was phrased this way: “This is my work *to my glory*—the immortality and eternal life of man” (Moses 1:39, 1835 ed.).

Although eternal life, or exaltation, is our ultimate goal, we all must discover and follow the path that leads to it. The Lord taught us that to have life eternal we must know Him (see John 17:3).

When I was a young man serving my mission in Uruguay and Argentina, I taught

repeatedly the scripture in John 17:3, “And this is life eternal, that they might know thee the only true God, and Jesus Christ, whom thou hast sent.” As I learned more about the gospel of Jesus Christ, this scripture began to take on more meaning. I realized that knowing the Lord, in the fuller meaning of this passage in John, meant more than simply knowing *about* Him. It meant ultimately to experience Him, to come into His presence.

On my mission I learned Spanish. The Spanish language makes this scripture more clear, because it has two verbs “to know”—*saber* and *conocer*. *Saber* means to have intellectual knowledge of something. *Conocer* means to experience or meet someone or something. The verb used in John 17:3 for know-

ing the Lord is *conocer*. In Spanish it becomes clear that to know Him in this sense is to meet Him and to come into His presence.

As I began to probe this concept, the importance of knowing the Lord as a key to gaining eternal life was driven home by other scriptures. For example, in Matthew 7:21–23, the Savior warned,

Not every one that saith unto me, Lord, Lord, shall enter into the kingdom of heaven; but he that doeth the will of my Father which is in heaven.

Many will say to me in that day, Lord, Lord, have we not prophesied in thy name? and in thy name have cast out devils? and in thy name done many wonderful works?

And then will I profess unto them, I never knew you: depart from me, ye that work iniquity.

The first important thing we learn about this passage is that, according to the Prophet John Taylor, it speaks of members of the Lord's Church who have done many wonderful works in His name but who fail to gain eternal life at the end. Significantly, the Lord inspired the Prophet Joseph Smith to make an important change to verse 23 that corresponds fully with John 17:3 and other scriptures. In the JST version of Matthew, the Lord says: “And then I will say, *ye never knew me*; depart from me, ye that work iniquity” (emphasis added).

The Book of Mormon confirms that the Joseph Smith Translation (JST) of Matthew 7:23 was inspired. Mosiah 26:25–26 states: “And it shall come to pass that when the second trump shall sound *then shall they that never knew me* come forth and shall stand before me. And then shall they know that I am the Lord their God, that I am their Redeemer; but they would not be redeemed” (emphasis added).

On my mission I also grew to love the scripture in Doctrine and Covenants 88:68, which states: “Therefore, sanctify yourselves that your minds become single to God, and the days will come that you shall see him; for he will unveil his face unto you, and it shall be in his own time, and in his own way, and according to his own will.” That scripture, coupled with my greater understanding of John 17:3, had a profound impact on my life. I wanted with all my heart to know the Lord in this fuller sense so that I, too, might have life eternal. I wanted to become worthy to

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come into His presence and thereby know Him. This, of course, is a long-range goal. To know the Lord in this sense became a lifelong quest for me.

As I pursued this quest, I became acquainted with the role of law in this process—the “law of Christ.” To begin, in the Doctrine and Covenants 130:20–21, the

Lord taught, “There is a law, irrevocably decreed in heaven before the foundations of this world, upon which all blessings are predicated—And when we obtain any blessing from God, it is by obedience to that law upon which it is predicated.”

Certainly, coming into the presence of the Lord would be a blessing, one of the greatest we could have. Thus, I understood there must be a law or laws upon which that blessing of knowing Him by coming into His presence is predicated. I continued to search more earnestly to discover those laws upon which this great blessing is predicated.

One day, while reading the Doctrine and Covenants, I found a key, the very key to knowing Him in this fuller sense mentioned in John 17:3. In Doctrine and Covenants 132:20–25, the Lord was speaking of those who were exalted.

Then shall they be gods, because they have no end; therefore shall they be from everlasting to everlasting, because they continue; then shall they be above all, because all things are subject unto them. Then shall they be gods, because they have all power, and the angels are subject unto them.

Verily, verily, I say unto you, except ye abide my law ye cannot attain to this glory.

For strait is the gate, and narrow the way that leadeth unto the exaltation and continuation of the lives, and few there be that find it, because ye receive me not in the world neither do ye know me.

But if ye receive me in the world, then shall ye know me, and shall receive your exaltation; that where I am ye shall be also.

This is eternal lives—to know the only wise and true God, and Jesus Christ, whom he hath sent. I am he. Receive ye, therefore, my law.

Broad is the gate, and wide the way that leadeth to the deaths; and many there are that go in thereat, because they receive me not, neither do they abide in my law.

There were two things that leaped out at me in this scripture: (1) the clear statement that our obedience to God’s law is absolutely necessary—for “except ye abide my law ye cannot attain to this glory,” and (2) that the key to knowing Him is to receive Him in the world. Indeed, I noticed this last statement was in the form of a conditional promise—“if ye receive me in the world, then shall ye know me.”

To receive the Lord in the world became the key to knowing Him. I continued to search the scriptures to find out what we must do to receive the Lord in the world. In doing so I rediscovered Doctrine and Covenants 84:33–40 and read the oath and covenant of the priesthood in an entirely new light.

For whoso is faithful unto the obtaining these two priesthoods of which I have spoken, and the magnifying their calling, are sanctified by the Spirit unto the renewing of their bodies.

They become the sons of Moses and of Aaron and the seed of Abraham, and the church and kingdom, and the elect of God.

And also all they who receive this priesthood receive me, saith the Lord;

For he that receiveth my servants receiveth me;

And he that receiveth me receiveth my Father;

And he that receiveth my Father receiveth my Father’s kingdom; therefore all that my Father hath shall be given unto him.

And this is according to the oath and covenant which belongeth to the priesthood.

Therefore, all those who receive the priesthood, receive this oath and covenant of my Father, which he cannot break, neither can it be moved.

It is not enough simply to be ordained to the priesthood in order to “receive it” for the purpose of receiving the Lord in the world. The first part of the oath and covenant of the priesthood makes this clear. It is only when a man obtains and magnifies his calling in the priesthood that he receives the sanctifying Spirit unto the renewing of his body and thereby becomes “the church and kingdom and the elect of God.” Thus, it is necessary for us to both receive the priest-

hood and magnify our callings therein in order to receive the Lord in the world.

Elder Boyd K. Packer has repeatedly taught that it is a false doctrine in the Church that we are free to turn down callings in the Church. Our covenants of sacrifice and consecration, properly understood, prevent us from doing so. In his book *Things of the Soul* (p. 25), Elder Packer quotes this teaching from the First Presidency: “In The Church of Jesus Christ of Latter-day Saints, as President J. Reuben Clark, Jr., said, ‘One takes the place to which one is duly called, which place one neither seeks, nor declines’ (Conference Report, April 1951, p. 154).”

I am personally convinced by my own personal experience in life that we are saved and exalted largely through this process of accepting and magnifying our callings. A calling gives us a purpose and stability in the many ups and downs of life. It gives us a reason to serve one another and opportunities to do so on a regular basis, a time when some of the greatest growth and joys are experienced in mortality.

Elder Packer also teaches that there is no greater calling than that of father or mother. He states: “Now some highly important counsel, young man. When you go to the temple to be married, there will be organized a unit of the Church, the eternal unit. You may be a bishop of a ward some day or the president of a stake, but from such callings you will be released. The highest calling that can come to you in mortality is to preside over a home as a husband and a father” (*id.* at 227).

Elder Packer then adds:

Make sure, young man, that you treat your wife with reverence and with respect. Treat her as your sweetheart, your loving companion, the mother of your children. In this marriage relationship comes the greatest of exaltation and the greatest experiences of life. You will come to know that most of what you know that is worth knowing you learn from your children. Then you will come to know that success comes from following a simple pattern. All you have to do is live the gospel. All you have to do is go to church and pay your tithing and try to live the gospel and respond to calls and try to do a responsive and dedicated work in the callings that come to you. Because, you see, the whole thing is put together. The ultimate aim of all of the activities in the Church is to have a father and a mother, a husband and a wife, and their children happy together at home. [Id. at 228]

This doctrine of accepting all callings and magnifying them is also confirmed in the *Teachings of the Prophet Joseph Smith* (p. 308, hereinafter *Teachings*), where the Prophet Joseph Smith revealed, “If a man gets a fullness of the priesthood of God he has to get it in the same way that Jesus Christ obtained it, and that was by keeping all the commandments and obeying all the ordinances of the house of the Lord.”

But that is not all. The oath and covenant also requires that we receive the Lord’s servants in order to receive Him in the world. Doctrine and Covenants 84:36 again states that “[H]e that receiveth my servants receiveth me.” Just as with receiving the priesthood, it is not enough just to listen to the Lord’s servants and their messages in

every conference, but we must be truly obedient to what we hear.

Ultimately, receiving the Lord in the world comes down to obedience—strict obedience—not just to commandments but to *all* the ordinances of the house of the Lord and to magnifying *all* callings we receive from His servants.

As I continued to search this doctrine, I found it fascinating that it was plainly taught by the Lord in the Bible as well. The Lord, as recorded in John 13:20, taught His people, “Verily, verily, I say unto you, He that receiveth whomsoever I send receiveth me; and he that receiveth me receiveth him that sent me.”

This same doctrine was also taught by the Lord in the Book of Mormon: “And wo

be unto him that will not hearken unto the words of Jesus, and also to them whom he hath chosen and sent among them; for whoso receiveth not the words of Jesus and the words of those whom he hath sent receiveth not him; and therefore he will not receive them at the last day” (3 Nephi 28:34).

In fact, I believe that this is one of the greatest tests we as lawyers will have: to be fully obedient to the counsel and teachings of the Lord’s *living* servants. This is exactly what we must do in order to receive the Lord in the world, which is the key to knowing Him.

This is especially challenging for lawyers for two primary reasons: (1) the law is a jealous mistress, and (2) we may think we are wise when we are learned. When I say that law is a jealous mistress, I am referring to the time that this practice demands. This alone makes it difficult to give proper time and attention to Church callings and to family duties.

When I say that we may think we are wise when we are learned, I am referring to the fact that as a group we are trained in logic and reasoning. Our profession, more than most, relies upon our wits. The sharper we are intellectually, the more we advance in the law. Although that can be a blessing, it also contains the seeds of a great danger: that of trusting in the arm of flesh over the whisperings of the Holy Spirit and over receiving the Lord’s servants and their words.

As to the jealous mistress point, I caution you as young lawyers to maintain balance in your lives with Church callings, family duties, and your profession. I speak of this after 32 years as a trial lawyer in a major firm. If you are not careful, your profession will capture all your available time. A wise lawyer taught me once that no one rewards you for doing the work of two when you take on the work of four. There is a strong pull to accept all assignments that come to you as a young lawyer. Beware of this temptation; keep balance in your life, for if you don’t, no one else will. It is better to temporarily disappoint someone looking for a person to fill an assignment than to take on more than you should. “For what shall it profit a man, if he shall gain the whole world, and lose his own soul” (Mark 8:36)—or his family?

As to the being learned point, too often people hold their obedience hostage to man’s logic. This is a great danger. In fact, obedience to the living prophets has always



been the greatest test—and always will be. From before the foundations of the world, the Savior told His associates in the creation, while referring to all of us in Abraham 3:24–25: “[W]e will make an earth whereon these may dwell; And we will prove them herewith, to see if they will do all things whatsoever the Lord their God shall command them.”

Recently, President Hinckley called upon all Church members in California to support Proposition 22, which added to the law of California: “Only a marriage between a man and a woman is valid or recognized.” There were many members of the Church who did not understand why they should be asked to support this ballot proposition by actively campaigning and donating funds to it. Many criticized the prophet for allegedly crossing the line between political and religious jurisdictions, saying that this call to arms violated the separation between church and state. Many others had problems understanding the Church’s position logically, based on their own views of what the world calls “political correctness.” As a result, there was much murmuring about the prophet’s summons to support Proposition 22.

Some people even boycotted the Church until the campaigning was over and the vote taken. This was most sad to see. These Saints had their faith tested, and it was found wanting. The good news is, these were a very small minority. However, the people in this category were mostly those with higher degrees—those highly educated by the world and more educated in so-called “political correctness.”

At one point a priesthood leader was quoted in the *Salt Lake Tribune* as saying in a ward council meeting that he had not yet received a witness of the correctness of this call to support Proposition 22. I learned who this priesthood leader was and approached him. He told me that he had said that because it was true. I asked him if he had recently read Ether 12:6, which states, “For ye receive no witness until after the trial of your faith.” He said he was familiar with that scripture.

I asked him what that scripture meant to him. He reflected on it, and gave the correct answer—“It means our faith must first be tried by our obedience to what living prophets tell us to do before we receive a witness of its truth.” We then discussed one

of my favorite passages from the Prophet Joseph Smith on this subject, which states, “Whatever God requires is right, no matter what it is, although we may not see the reason thereof till long after the events transpire.” The Prophet added, “God said, ‘Thou shalt not kill;’ at another time He said, ‘Thou shalt utterly destroy.’ This is the principle on which the government of heaven is conducted—by revelation adapted to the circumstances in which the children of the kingdom are placed” (*Teachings*, p. 256).

Then I said that it is my experience that the Lord first tests our faith by our obedience to revealed principles before giving us the more complete reasons why. But there is one thing we can and should always be able to know—that it came from God or His authorized servants. As it says in Doctrine and Covenants 1:38: “What I the Lord have spoken, I have spoken, and I excuse not myself; and though the heavens and the earth pass away, my word shall not pass away, but shall all be fulfilled, whether by mine own voice or by the voice of my servants, it is the same.”

The Lord is always willing to give us a spiritual witness of the divinity of a prophet. If we do not have that spiritual witness, that is a different and more pressing problem—either because we did not ask Him sincerely, or because we are not living our life close enough to Him to receive such confirmation.

I reminded the priesthood leader that this call to arms was directly from the Lord’s prophet in a general priesthood session of general conference. That should be clear enough that it came from God or the voice of His servants. The priesthood leader said he truly felt sorry for having said what he said in a Church meeting, and he swiftly repented. He was an outstanding and exemplary leader thereafter in every way. He had learned a valuable lesson, one that would serve him well throughout his life.

There are many other examples of how we must never use man’s logic—the arm of flesh—to hold our obedience hostage, especially our obedience to His living prophets. A classic is when Adam was commanded by God to offer animal sacrifice in a very specific way, using the firstlings of the flock, specifically an unblemished lamb, whose bones must not be broken in the sacrifice offering, and given many other details that

must have seemed meaningless and strange to Adam. No explanation was given of why Adam was required to do this sacrifice or what it meant. Yet Adam was obedient.

After Adam had been obedient for some time, an angel of the Lord came to him and asked why he offered sacrifice. We all know his response: “I know not, save the Lord commanded me” (Moses 5:6). Adam didn’t know the ultimate reasons why he was doing it, but the one thing he had to know he did know—that the Lord had commanded him to do it. That was sufficient for Adam. And once we know it comes from God—or His authorized servants on earth—it should also be sufficient for us.

Another example of how the Lord tests our faith by asking us to do things that seem illogical is the story of Abraham and Isaac. Abraham was told by an angel of the Lord that he was to take Isaac, his only son, from his first wife, Sarah, and sacrifice his life. No explanation was given—just that it was what God required of him. That command must have seemed totally illogical to Abraham. Isaac had come to him by a miracle birth, something that would take another miracle to duplicate. Abraham was promised an endless seed through Isaac, as numerous as the stars of the heaven or the sands of the seashore. Yet his only son Isaac now was to be sacrificed before Isaac had married or had any posterity.

But Abraham didn’t murmur to the Lord or the angel. Rather, he went and did as the Lord commanded him; undoubtedly with a very heavy heart. But in the end his obedience passed the test, and the Lord blessed Abraham forever. The Lord gives this added insight in Doctrine and Covenants 132:37: “Abraham . . . as Isaac also and Jacob did none other things than that which they were commanded; and because they did none other things than that which they were commanded, they have entered into their exaltation, according to the promises, and sit upon thrones, and are not angels but are gods.”

In the days of Elijah the prophet, the Lord told him to go to a widow during a severe drought that Elijah had ordered at the Lord’s behest. The Lord told Elijah to tell the widow to prepare him a cake to eat and that if she did, she would not lack. We all know the story. The widow said she only had enough to prepare a cake for her and

her son, and they were planning to eat it and die. Elijah gave his promise that if she would first prepare a cake for him, the Lord would assure that the barrel of meal and the cruse of oil would not fail. The scripture records the widow's faith and obedience, as well as the day-by-day fulfillment of the prophet's promise.

Again we might ask ourselves, How logical was it that such an outcome would happen? If we tested the Lord's commands only by man's logic, we would often withhold our obedience to the most important tests—the ones that would determine our eternal destiny.

Yet in our very own time the Lord has given the same kind of command to all of us. He gave it to the Church at the time of the Prophet Joseph Smith. Note what the Lord said in Doctrine and Covenants 43:12–14:

And if ye desire the glories of the kingdom, appoint ye my servant Joseph Smith, Jun., and uphold him before me by the prayer of faith.

And again, I say unto you, that if ye desire the mysteries of the kingdom, provide for him food and raiment, and whatsoever thing he needeth to accomplish the work wherewith I have commanded him;

And if ye do it not he shall remain unto them that have received him, that I may reserve unto myself a pure people before me. [Emphasis added]

This gives us a greater sense of what it means to “receive the Lord's servants” in order to receive the Lord in the world. We must sustain His servants by our prayers of faith; we must provide for them food and raiment, if necessary, and “whatsoever thing [they] need to accomplish the work wherewith [the Lord has] commanded [them]” including our obedience to their teachings. Make no mistake, to receive the Lord's servants and their words, we must be obedient to their directives and teachings given in general conferences and elsewhere.

During the Savior's ministry, He was tempted by the Pharisees, one of whom asked Him, “Master, what is the great commandment in the law? Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it,

Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets” (Matthew 22:36–40).

If on these two commandments hang all the law and the prophets, this is the law that we must live to know Him in the fullest sense. It eclipses all other laws. We must love Him with all our hearts, our souls, and our minds. In other places the Lord reiterates this great law by telling us that He requires our hearts. In Doctrine and Covenants 64:22 He tells us plainly that “I, the Lord, require the hearts of the children of men.” In verse 34 He reiterates this again with an additional requirement: “Behold, the Lord requireth the heart and a willing mind.”

A caution is thus in order. Mere conformity is not true obedience. Even Laman and Lemuel conformed most of the time to what their father, the Lord's prophet, told them to do. They initially left their homes and possessions in Jerusalem to go with their family to the wilderness. They went back to Jerusalem to seek the brass plates. They went back again to bring the daughters of Ishmael and returned to the wilderness. They helped Nephi build the ship to cross the great waters. They went on the ship. But their conformity was almost always with a great deal of murmuring. To murmur, simply stated, means to complain. We must resist the temptation to complain about the Lord's chosen leaders, anyone who holds a stewardship over us in the kingdom of God. This is destructive to the spirit and prevents—or damns—our spiritual progress.

Finally, I came to learn what a wise man once called the law of surrogates. I learned there is another way in which we can receive the Lord in the world. I spent my life seeking His face, yet I discovered His face was all around me but I couldn't see it. A surrogate is someone who takes the place of another, who represents the first person. The Savior taught us this great lesson Himself. In describing the scene on Judgment Day in Matthew 25:31–40, He said:

When the Son of man shall come in his glory, and all the holy angels with him, then shall he sit upon the throne of his glory:

And before him shall be gathered all nations: and he shall separate them one from another, as a shepherd divideth his sheep from the goats:

And he shall set the sheep on his right hand, but the goats on the left.

Then shall the King say unto them on his right hand, Come, ye blessed of my Father, inherit the kingdom prepared for you from the foundation of the world:

For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in:

Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me.

Then shall the righteous answer him, saying, Lord, when saw we thee an hungred, and fed thee? or thirsty, and gave thee drink?

When saw we thee a stranger, and took thee in? or naked, and clothed thee?

Or when saw we thee sick, or in prison, and came unto thee?

And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.

Every time my service has flagged, every time I get so tired I think of missing my home teaching assignment, I think of each such person as if they were the Savior. Then somehow my fatigue gives way to a wonderful feeling that I have the opportunity to come into His presence by serving that fellow member in need. His words echo in my mind, “Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.”

The Savior is all around us. His surrogates are each of our fellowmen. It was perhaps this thought that the Savior was articulating when He said the second great commandment of loving our neighbor as ourselves was like unto the first of loving God with all our heart, mind, and soul. For when we love our neighbor as ourselves, we have done it unto Him.

May we all become more obedient and receive the Lord in the world by receiving and magnifying all callings in the priesthood and the Church, especially that of father and mother, and by serving well our neighbor—even the least of these His brethren—that we may come to know Him in this fullest sense, whom to know is life eternal, is my prayer and blessing on each of us here tonight. I say this in the name of Jesus Christ, amen.

Randall Huff is an Area Authority Seventy for The Church of Jesus Christ of Latter-day Saints.



become deliverers

by President James E. Faust

Illustrations by Brad Holland



you should all feel privileged to graduate from such a distinguished law school. It is remarkable that the J. Reuben Clark Law School has achieved such a position of eminence in just one generation. This is due not only to the excellence of the faculty and the competence of the graduates but also to its sponsoring institution, The Church of Jesus Christ of Latter-day Saints. This institution is supported in large measure from tithing funds, so we must be grateful for the faithful tithe payers who help make your educations possible.

This is a great day in your lives. I hope you're as happy to graduate from law school as I was 54 years ago. I thought it would be

the end of my troubles, but I didn't know which end. I knew more of the general rules of law when I graduated than I have ever since. But I was uncertain if I could apply my knowledge of the rules of law to practical situations. I wondered if I could use my legal credentials to support my wife and family and take care of our financial and other needs. I was married, like many of you. My wife and I had one child, and we were expecting another at the time of my graduation.

Justice Richard C. Howe and I grew up together and went through law school at the same time; he is still a member of our Supreme Court and just last month was released as chief justice of that court. With his permission, I quote what he said to the law school graduates at a recent commencement exercise:

You have heard it said in law school that the law is a jealous mistress. You will soon find that to be true—that a man's making a living and serving people bring pressures. Do all you can to reserve time for your spouse and family. Lawyers are no different from other people. They need a balanced life. Your spouse, if you have one, and your family need you, and you need them. A lawyer for one of the largest insurance companies that provide malpractice insurance for lawyers recently told members of the Utah Bar Association in their recent midyear convention in St. George that 25 percent of lawyers suffer from depression. Much of that is brought

about by the intensity of the legal practice. You must take time to break away from the jealous mistress and lead a balanced life.

To be learned in the law is a great education because the common law is a distillation of so much human experience. Elder Jeffrey R. Holland tells a story about some educators here at BYU who did not measure up to President Wilkinson's expectations. President Wilkinson responded, "What can you expect from someone who is not learned in the law?" I sincerely hope that 50 years after your graduation you can say, as I can, that you are grateful for having gone to law school. If I were starting over, I would do it the same way.

Vic Alstrom, the clerk of the federal court in Utah, served in the 91st division in World War I with my father, so he took a personal interest in me. The day I was sworn in to the federal court, he took me to sign the roll of attorneys. He took time to turn the pages back to members of that bar who had distinguished themselves in life. They were giants in the land. Among them were J. Reuben Clark, Jr., Henry D. Moyle, Stephen L. Richards, Hugh B. Brown, Marion G. Romney, and others. They were more than lawyers. They were businessmen, statesmen, entrepreneurs, and legal and spiritual scholars. Each of them, like Solomon, had understanding hearts and profound wisdom. Each had a great soul. They have been a great influence in my life, and each of them used training in the law as a stepping-stone to something greater.

The knowledge you have gained of the law can be a springboard to accomplish things that otherwise you might not have been able to do. Our class had outstanding instructors: one of them was Professor Dwight Pomeroy, who was a captain in the U.S. Army in World War I. He told us that if you were invited to participate in any game, the first question you would ask is, "What are the rules?" He told us that we're all here on earth to conduct our life, and we need to know the rules. The law furnishes many of those rules.

Actual rules and professional rules become almost inseparable, because one cannot have professional integrity without having personal integrity, and vice versa. Years ago I was in the police court in Salt

Lake City. A respected member of the bar, Ray McCarty, was handling a defense for his client, who was charged with some lesser crime. When the case was called, the witnesses for the prosecution did not show up. So the court was left with no choice but to dismiss the charges against the defendants. After the charges had been dismissed, the witnesses, for some reason or another, showed up late. Ray McCarty and his clients could have walked out, but when the witnesses showed up, Ray called his clients back into the courtroom and insisted that the case be recalled and that it be heard on the merits. Ray subsequently became the president of the Utah Bar Association.

Much can be said about professional competence; but the real genius is in preparation—I mean careful, painstaking preparation, with all of the drudgery that goes into it. The discipline of law school has helped prepare you for this. One time I found myself along with 15 other lawyers involved in a case we thought was important. It certainly was to our clients. One of the opposing counsel, who held high political office in the state of Utah, was one of the most gifted orators we had at the bar. His strength was in speaking, not researching the law. My associates and I had meticulously run down every case precedent we could find so that we knew the governing legal principles. When our opponent got up to speak, he was like a great musician, playing the violin with his sweetest tones. It was mesmerizing. It was a treat to listen to him. He almost persuaded me, although I knew he was wrong because he did not have the correct advocacy of the law. We had a country judge, sitting from the southern part of the state, and our opponent's oratories spellbound him. But at the end of the day, it was the careful preparation—not the brilliant oratory—that carried the day.

"The law must be used to help people and to bless their lives," Justice Howe said. "This legal training and experience, enhanced by spiritual training, is a tremendous force for doing good for people. We change our own lives in helping others to change theirs," he said.

I hope you will use your education, your degree, and your license to practice law to serve people. This may seem self-evident, but let me explain. Many people today can-

James E. Faust: Consummate Lawyer and Public Servant

BY LOVISA LYMAN

President James E. Faust, Second Counselor in the First Presidency of The Church of Jesus Christ of Latter-day Saints, was awarded the Marion G. Romney Law and Public Service Award at the 2002 Law School Convocation. President Faust is the second recipient of this award since its institution by the BYU Board of Trustees in September 1981.¹

Upon bestowing the honor, Dean H. Reese Hansen explained that it is reserved for lawyers who are “exemplary model[s] of integrating professional integrity and professional attainment with significant public and church service.” President Marion G. Romney, for whom the award is named, was just such an attorney. A former counselor in the First Presidency of the Church, he played a key role in establishing the Law School. President Faust is another such man.

After serving as one of the earliest LDS missionaries in Brazil and as a first lieutenant in the U.S. Army Air Force during World War II, President Faust graduated with BA and JD degrees from the University of Utah in 1948 and entered legal practice. He quickly earned the respect and admiration of his colleagues and his firm’s clients, one of which was the local Catholic church. He became such an ethical icon that one-time federal district court judge A. Sherman Christensen told his

clerk, “If you watch James Faust and follow the way he does things, you will know how you should act as a lawyer.”²

Excellence as an attorney was only the beginning of Elder Faust’s service. While he was a full-time advocate, he served as a member of the Utah Legislature, president of the Utah Bar Association, a member of the Utah State Constitutional Revision Commission, a member of the American Bar Association United States Supreme Court Judicial Nominating Committee for Utah, and a presidential appointee under John F. Kennedy to the Lawyers Committee for Civil Rights and Racial Unrest.

Indicative of the long-term respect garnered over his many years of service, President Faust was awarded the Distinguished Lawyer Emeritus Award by the Utah State Bar Association in 1995, an honorary doctorate from BYU in 1997, and honorary citizenship from the city of Sao Paulo, Brazil, in 1998.

Elder Neal A. Maxwell sees President Faust’s many public service attainments during his years practicing law as excellent preparation for his long service as chair of the Church’s Public Affairs Committee.³ President Faust’s other Church service includes counselor in his ward Sunday School at age 17 and bishop at 28, followed by high councilor, stake president, and regional representative before becoming a General Authority. As

Elder Maxwell says, “[H]e has done it all in terms of Church service.”⁴

President Faust practiced law with distinction until 1972, when he was called as a General Authority of the Church. He first served as an Assistant to the Quorum of the Twelve Apostles, then as a member of the Presidency of the First Quorum of the Seventy, and then as an Apostle. He became Second Counselor in the First Presidency in 1995. At that time, President Gordon B. Hinckley said, “President James E. Faust comes to this office with the kind of maturity that results from long experience in the Church. This experience, coupled with the wisdom developed in pursuit of a legal career, provides substantial strength in the sacred calling that has come to him.”⁵

President Faust and his wife, Ruth, are the parents of three sons and two daughters. All of his sons are attorneys, two of them graduates of BYU Law School.

ENDNOTES

- 1 In 1982 the Marion G. Romney Award was conferred on Rex E. Lee, founding dean of the Law School, when he was serving as solicitor general of the United States.
- 2 Elder Stephen A. West, “A Pairing of Disciplines,” *Clark Memorandum*, spring 2002, 21.
- 3 Elder Neal A. Maxwell, “President James E. Faust: ‘Pure Gold,’” *Ensign*, Aug. 1995, 12.
- 4 *Id.* at 15.
- 5 *Id.*

not afford legal services. No, these are not the people who live below the poverty level. There are government and charitable organizations that provide legal services to the people below the poverty line. What I am talking about now are people who are self-supporting, who work every day, and whose income is at the lower levels of the middle class. In my own personal experience, I received more satisfaction from helping people in these economic circumstances, whose property and health were at risk, than I

did in representing big, well-financed, soulless corporations.

I have found the law has been a very satisfying professional calling. As I mentioned, if I had to live my life over again, I would study the law in a heartbeat. I must say that I’ve always been proud to be a member of the Utah State Bar, of the Supreme Court of this state, and of the Supreme Court of the United States. The law opened other doors, but I must admit to you that there have been other callings that have given me more satis-

faction, greater fulfillment, and more personal peace than the adversary practice of the law. The law has been a good way to keep food on the table, but the outreach that can come from the knowledge of the law can add something more in terms of personal fulfillment than the adversary settlement of controversy.

My father’s law school dean at the end of World War I and my law school dean at the end of World War II were one and the same: Dean William H. Leary. He reminded us that



because much of the body of the law changes, mostly what we want to teach at law school is how to think straight. If we missed a vital point in recitation, he was quick to tell us how stupid we were. One time he became so exasperated he said, "If I had any hair on my head, I would pull it out." He was bald. That rebuke was embarrassing and hard to take, but it taught me to try to think discriminately. One time I was reciting and I missed on equitable servitude. He said, "Mr. Faust, you wouldn't even recognize your own grandmother if she came around a different corner."

If your class is like the national average, half of you will be in private practice in solo, small, or large firms. A quarter will be government lawyers, and the rest will be in-house counsel for business or use your training in business. A few of you will become teachers or judges. It has been said, "From the A students come the professors, from the B students come the judges, and the C students make the money."

In my law office I had a plaque with a quote from Abraham Lincoln: "A lawyer's time and advice are his stock and trade." So, what does a lawyer have to sell? What does his client buy? Is it knowledge of the law? Is it knowledge of procedure? Is it intelligence? Is it experience? Is it service? Is it results? Is it advocacy? Or is it mostly wisdom and integrity? You say, "Well, isn't the end product of the law supposed to be justice?" Aren't litigants satisfied with justice? If it does not favor them, they don't want it. You might add, "Well, what is more noble than justice? What can the law provide more worthy than justice?" Not all of you would agree, but my answer is *mercy*. Shakespeare, speaking through Portia, gives us these eloquent lines about mercy: "It is enthroned in the hearts of kings. It is an attribute of God himself. It seasons justice," because in the course of justice, none of us should see salvation; we do pray for mercy, and that same prayer teaches us all to render the deeds of mercy.

So, how can the law be a key to more than well-paid drudgery, of drawing intricate

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contracts, wills, and trusts? I do not wish in any sense to be sacrilegious, but I take a generic reference to being a savior, which is "one that saves from danger or destruction." I also take a text from an obscure Old Testament prophet by the name of Obadiah, who has a two-and-a-half-minute talk of 21 verses in the Bible. I quote the 21st verse, "And saviours shall come up on mount Zion to judge the mount of Esau; and the kingdom shall be the Lord's" (Obadiah 1:21). To avoid profaning the word *savior* in the context of lawyering, let me substitute *deliverer*. I would urge all and each of you to become deliverers. How can you become a deliverer? Each of you must learn to make that application for yourselves. Whether you are looked upon as a deliverer or a rascal, or something in between, will depend largely upon your own motivation. That is, what is in your heart of hearts? One of your challenges will be to make economic rewards your lesser consideration rather than your first.

So my challenge to you gifted and able young men and women, who are learned in the law, is to become more than a successful practitioner living in a big house, with a sizeable mortgage. Look upon your learning and license to practice law as a way to do great things for little people and little things for everyone.

Vaclav Havel, former president of the Czech Socialist Republic, sometime ago told the United States Congress, "The salvation of this human world lies nowhere else than in the human heart, in the human power to reflect, in human meekness and in human responsibility." May you use your training in the law as a stepping-stone to something greater. May this legal training you have now acquired, together with your spiritual training, be a tremendous force in helping humanity. I invoke the blessings of heaven to be upon you, upon your companions, upon your families, and upon your parents and your loved ones and extend to you every good wish and blessing. In the name of Jesus Christ, amen.

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Pablo Picasso, *Guitar and Wine Glass*, 1912.

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PART TWO OF TWO

COMPOSING LAW

BY BRETT G. SCHARFFS¹

tions emphasize creating order out of chaos, bringing disparate elements together, and engendering harmony or quietude.

In this part, *Composing Law*, I will discuss the most common meaning of the word compose: “to create (a literary, musical, or choreographic work).”³ While it is unlikely that President Richards had this broad meaning in mind when he told President Hinckley he wanted to compose the situation, I have found it valuable to ponder the richness of the word *compose*, with all its connotations.

This definition might seem to have the least relevance for practicing lawyers. I am sympathetic to this reaction. Indeed, on one level I share it. As a junior securities attorney at a Wall Street law firm, I often felt like a highly paid proofreader, an interchangeable and easily replaceable part, or a fungible billing unit, whose job it was to process enormous quantities of technical and detailed reams of paper without error or complaint. Comparing the daily grind of being a lawyer with the creativity and sublimity of the composition of great music might seem ludicrous, or at least hopelessly naive.

Professor Bruce Ackerman has said that the greatest challenge facing lawyers is to avoid settling for a “self-trivializing conception of lawyering.”⁴ In a speech to incoming students, Yale Law School Dean Anthony Kronman suggested one way to avoid such a pitfall.

*Remember the satisfaction that comes from service to the world, and the equally great satisfaction that comes from singularity within it. Remember the pleasure of creation, which you have demonstrated over and over again, and which has propelled you forward in your lives, to this day and place. Remember the thrill of your own novelty, of your power to reimagine the world as you found it. This power will be tested in the years ahead, for you are coming into the house of the law, where the oldest and most deeply entrenched habits of humankind prevail, and where the forces of institutional life, with their pressure toward concession and conformity, are at maximum strength.*⁵

Consider the ingredients of professional satisfaction that Dean Kronman identifies: serving others, relishing and preserving one’s singularity, experiencing the pleasure of creation and the thrill of one’s own novelty, and exercising the power to imagine the world as

something better than one found it. Consider also the forces that push us towards settling for less: entrenched professional habits, institutional imperatives, and the pressures toward concession and conformity.

In the face of these obstacles, one key to overcoming the temptation to settle for a self-trivializing account of lawyering lies in our capacity and our duty to be creators. Perhaps it is more than a coincidence that a striking number of musicologists, composers, and theorists have also been lawyers, including Handel, Schumann, Tchaikovsky, Stravinsky, Bartok, Sibelius, and Schenker.⁶ In studying musical composition, we can find some clues to how we might increase our capacity for creativity as lawyers.

I will suggest that lawyers can, should, and must be composers. While the connections between literature and law have been explored at length,⁷ the connections between musical composition and lawyering have yet to be explored in depth.⁸ This article is a tentative attempt to examine some of the similarities between musical and legal composition, and to reflect upon the paradoxes that arise in each field.

A SELF-TRIVIALIZING CONCEPTION OF LAWYERING

Many years ago Stephen L. Richards of the First Presidency of The Church of Jesus Christ of Latter-day Saints asked a young Gordon B. Hinckley for help with a “very delicate and sensitive matter” that was “fraught with most grave and serious consequences.” When President Hinckley suggested finding a lawyer, President Richards responded, “I am a lawyer. I don’t want to litigate this. I want to compose it.”⁹

While troubled that President Richards’ instincts told him that a lawyer was precisely the sort of person he did not want in such a delicate situation, I was puzzled and intrigued with his use of the word *compose* to describe what he wanted done. In Part I of this article, *Composing Conflict*, I discussed four related definitions of the word compose: (1) to end or settle a dispute, (2) to put together, (3) to put into proper form or order (to create coherence), and (4) to bring about a condition of repose or calmness—and suggested that each of these represents skills, or even habits of character, that every good lawyer should seek to cultivate. These defini-

THE MUSIC OF THE LAWS

Professor Daniel Kornstein notes that at the beginning of the 17th century, astronomer Johannes Kepler “watched the skies and heard the ‘music of the spheres,’” and suggests that we may also be able to hear the “music of the laws.”¹⁰ Despite a cacophony of laws that often seem “chaotic and confused, an incomprehensible and incoherent welter of apparently contradictory and ever-changing rules, traditions, and practices,”¹¹ Kornstein urges that “there may well be mysterious harmonies, rhythms, and relationships to be discerned.”¹²

Music and the law, Kornstein argues, share much in common. Each “conjures up a refined, elite endeavor, a product of man’s intelligence at its most highly civilized and highly disciplined. Both music and law are sometimes seen as expressions of the sublime, the beautiful, and the eternal, and both are based on the norms of Western civilization

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Georges Braque, *Violin and Palette*, 1909.
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and the quiet pursuit of reason. Indeed, music has widened the sphere of legal ideas and enriched law with new images.”¹² Kornstein suggests, it is easy to “sense the quasi-symphonic nature of law.”¹³ The basic themes of the law—justice, mercy, due process—serve as leitmotifs, and “[v]ariations on these legal leitmotifs arise from different factual contexts as well as changed moral and social values.”¹⁴

LAWYERS AS PERFORMERS

Most analyses of the connections between music and the law focus upon similarities that arise in musicians’ and lawyers’ roles as performers and, in particular, on similar issues that arise in the interpretation of musical and legal texts.¹⁵ Both music and law involve specialized and sophisticated systems of notation¹⁶ and interpretation.¹⁷ Kornstein observes, “In music, scores provide the texts. In law, the texts are constitutions, statutes, ordinances, regulations, and cases.”¹⁸ The first duty of the musician as well as the lawyer confronted with a text is fidelity to the text and intent as written. Nevertheless, interpretation is ubiquitous. A successful or comprehensive system of notation will not eliminate the possibility of, indeed will retain the necessity for, interpretation.

The composer’s text and intent is always the benchmark against which interpretations of a musical piece will be measured, although the composer’s intent will not exhaust the meanings that can be found or extracted from a composition. A lawyer, like a musician, can be rightly criticized for being mechanical in his interpretation, as well as for taking too great liberties in his interpretation. Composers of music are often surprised—sometimes pleasantly, sometimes not—to see what others have “found” in their work, as is illustrated by the following exchange between Franz Liszt and Frederic Chopin.

One evening . . . Liszt played one of Chopin’s nocturnes, to which he took the liberty of adding some embellishments. Chopin . . . at last could not control himself any longer, and in that tone of sang froid which he sometimes assumed he said, “I beg you, my dear friend, when you do me the honor of playing my compositions, to play them as they are written or else not at all.” “Play it yourself then,” said Liszt, rising from the piano, rather piqued. “With pleasure,” answered Chopin. . . .

When he left the piano his audience was in tears; Liszt was deeply affected, and said to Chopin, as he embraced him, "Yes, my friend, you were right; works like yours ought not to be meddled with; other people's alterations only spoil them. You are a true poet." "Oh, it is nothing," returned Chopin, gaily, "We have each our own style."²⁹

Consumers of a composer's work inevitably will bring their own ideas, needs, skills, predispositions, abilities, and weaknesses to their interpretation of the work.²⁰ Still, we will usually be able to discern the difference between interpreting a composer's work, writing a variation of it, quoting it, and butchering or mocking it.

Judge Learned Hand observed that when interpreting a statute, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."²¹ Thus, both text and context are necessary components of interpretation. Skillful lawyers like skillful musicians know how to create melodies from discrete notes, as well as how to improvise, quote historic sources, and play variations on a theme created by someone else.

DELIBERATE PRACTICE

Another similarity between being a skilled performer of music or law involves the disciplines of "deliberate" and "reflective" practice, which includes structured learning activities with feedback. BYU Law Professors Larry Farmer and Gerry Williams have argued that one path to the development of expert-level lawyering skills is disciplined and reflective practice, analogous to practice by skilled musicians and athletes.²² While repetitive, self-conscious practice is common for musicians and athletes, many lawyers seldom carve time out of their busy routines for analogous practice, self-evaluation, and preparation. It is interesting that we refer to the professional work of lawyers as the "practice" of law, even though so little of what generally travels under the banner of "practice" actually takes place. In a study conducted by Professors Farmer and Williams, the attorney in a large metropolitan area who was consistently rated by his peers as the most

effective lawyer had a disciplined practice of carefully reviewing and assessing his performance at the end of each engagement.²³

.03 COMPOSING LAW

While these connections between music and law are significant, my suggestion that lawyers should strive to be composers pushes the musical analogy further. Lawyers are not just performers of other people's works, and being a good lawyer involves more than being a skilled interpreter of texts.²⁴

As lawyers, we can easily become preoccupied with perfection, likening our task to attempting to perform without error a Bach fugue, failing to realize that real perfection lies not in performing the fugue flawlessly but in composing it.²⁵ It is as creators and not merely as performers that we are likely to find our deepest satisfaction as lawyers. Being creative involves more than just hitting every note and avoiding mistakes; it involves the skillful and inspired bringing into being of something new, not out of nothing, and not in disregard of law, but from materials that already exist and in ways that have yet to be imagined.

Compositional skills are easily evident in the writing of an appellate brief,²⁶ in opening or closing argument in a trial,²⁷ or the composition of the story that a lawyer hopes to communicate to a jury through the selection, order of appearance, and type of questions asked of witnesses in a trial.²⁸ Perhaps less obviously, compositional skills are helpful for a lawyer trying to structure a business relationship between parties who are not altogether familiar with or trusting of each other.²⁹

I will focus here on two aspects of viewing the lawyer as a composer, one that is apparent from the surface, and one that lies hidden somewhat beneath the surface. The surface relationship between composing music and composing law lies in each discipline's analogous use of similar components of structure and order. The deeper kinship lies in what I will call the paradoxes of composition, or the ways in which composition in each field entails both following and breaking

rules. Inspired composition involves a synthesis of freedom and constraint in ways that result in the creation of something new, although not altogether new.

COMPONENTS OF STRUCTURE AND ORDER

According to music educator and theorist Stanley Sadie, "A musical tone is the product of regular vibration in the air, and is perceived when an inner part of the listener's ear is made to vibrate in sympathy."³⁰ Music is contrasted with noise, which is the product of "irregular vibration."³¹ A musical composition comprises "a very large number of musical tones, intended to be heard in a carefully ordered pattern."³² A successful legal argument, whether to or by a judge, is also made to "vibrate in sympathy," and reflects a "carefully ordered pattern," and the antithesis of a successful legal argument would be the "noise" of "irregular vibrations."³³

Sadie explains that in music, "The basic systems of ordering are three: *rhythm*, which governs the movement of music in time; *melody*, which means the linear arrangement of tones; and *harmony*, which deals with the simultaneous sounding of different tones."³⁴ Together with *structure*, each of these elements is among the "materials of music" that the composer has at her disposal in creating a composition.³⁵ There are several striking similarities between the skillful manipulation and integration of rhythm, melody, structure, and harmony in musical and legal composition.

☐ **Rhythm:** Professor Sadie explains, "The most basic element in music is *rhythm*; some musical systems, in fact, use rhythm alone."³⁶ Whereas painting and sculpture exist in space, music exists in time. Rhythm is communicated by durational symbols. The *beat* is the "basic pulse of a musical passage."³⁷ The rate at which the beats occur is the *tempo*.³⁸ The grouping of beats into consistent patterns throughout a passage is called *meter*.³⁹

Lawyers, likewise, must concern themselves with the timing, rhythm, beat, tempo, and meter of their arguments. In the courtroom the importance of such skills is obvious, but they are also helpful in less overtly performance-oriented aspects of lawyering, such as negotiating a contract or setting the stage for settling a lawsuit.

As a young legal assistant to an American judge on the Iran-U.S. Claims Tribunal in

The Hague, I learned an important lesson about the use of rhythm, tempo, and meter in making legal arguments. At that tribunal, the court usually sat in panels of three judges, one from Iran, one from the United States, and one from a neutral country. Given the situational dynamics, the Iranian and American judge each often found themselves trying to convince the neutral country judge to side with their view of the case.

One of the most interesting aspects of the job was that, unlike in U.S. courts, law clerks met in conference with the judges when a case was being deliberated. The deliberations in a given case could often last 30 to 50 hours over the course of several months. In a typical session, the Iranian judge would begin by giving a 90-minute speech about some aspect of the case, during which he would make all manner of misleading and inaccurate statements and characterizations. My boss, Judge George Aldrich, would often speak next, usually for 5 or 10 minutes. Then the neutral country judge would speak. The Iranian judge would then spend another 60 or 70 minutes repeating earlier points and mischaracterizing what Judge Aldrich had said. Judge Aldrich would then respond, again in 5 or 10 minutes.

I was in the grip of a high school debater's mentality that demanded that no ridiculous statement or argument go un rebutted, and Judge Aldrich's self-restraint exasperated me. When I asked Judge Aldrich why he didn't answer in greater detail, his response taught me an important lesson. "I just watch [the neutral country judge] to see whether he is taking ridiculous arguments seriously; if he isn't, I don't want to irritate him by making obvious points." Judge Aldrich explained that he also didn't want to put the neutral judge in the position of appearing to be convinced by the "American" view of the case. "I try to limit myself to situations where I think he may be heading in the wrong direction." With his careful attention to his audience, Judge Aldrich was a master of understanding the rhythm, tempo, and meter of successful legal argumentation.

☐ *Melody*: Professor Sadie defines melody "as a 'succession of notes in a musically expressive order.' Certainly, to most people's minds, melody is the heart of music; no

aspect of musical skill is as much prized as the ability to compose melodies that are shapely, expressive, and memorable."⁴⁰

One important aspect of melody is the "capacity of a line of music to impress itself quickly and clearly on the memory."⁴¹ Melodies are "built out of a series of short phrases, planned sometimes to answer one another, sometimes to repeat or echo."⁴² In his analysis of Johann Sebastian Bach's Well-Tempered Clavier, *Bachanalia*, Eric Lewis Altschuler argues that one of the keys to Bach's genius was the "magical method Bach used to organize material," basing a piece on a single theme or motive, and then ensuring that the motive is felt, in some form, in virtually every measure of the piece.⁴³ Altschuler notes that you can verify Bach's repetition of themes or motives merely by flipping through the pages of a collection of Bach's works. "You'll notice that no two pieces look the same. And that's because each piece has a different motive, and each piece uses its motive almost to the exclusion of anything else."⁴⁴

The basic, memorable message that a lawyer hopes to communicate can be compared to a melody. In the contest over the last presidential election, for example, David Boies, Vice President Gore's lead attorney, did a masterful job of articulating the theme "Every vote must be counted." Sometimes the theme provided the "main material," and sometimes it was "tucked away in the accompaniment," but its presence was always felt. Governor Bush's lawyers also played variations on a simple theme, "The rules cannot be changed at the end of the game." These arguments were made again and again, by various voices, in an assortment of keys⁴⁵ and harmonies,⁴⁶ marked by modulations⁴⁷ and cadences.⁴⁸

☐ *Structure*: The force of a memorable melody can be enhanced when it is integrated into a disciplined musical structure, such as a fugue. Altschuler notes, "The power and beauty of a fugue comes from its basic three-section structure: a clear beginning in which all of the voices are introduced without confusion; a manifest division into beginning, middle, end; and a graceful finish with the coda."⁴⁹ Even operating within the formal constraints of the fugue form, Altschuler emphasizes, "The potential for

different ways to fill in a fugue's basic structure is tremendous."⁵⁰

An appellate brief follows a similar fugue-like structure, with a clear beginning in which the voices are introduced, a formal division into beginning, middle, and end, and—hopefully—a graceful finishing coda.⁵¹ A skillful appellate lawyer finds the form liberating rather than constraining, with ample space for creativity and flexibility within its form. An effective trial lawyer will likewise subject her presentation of witnesses and evidence to a disciplined structure that reinforces the main melody of a case.

A musical piece without a good overall structure, Altschuler urges, is like a "bad movie with a few good jokes, a boring play with one dramatic scene, or a lousy book with a few nice pages of dialogue."⁵² Altschuler maintains that "Bach recognized the importance of the overall structure of a piece, and always took the greatest care to see that all of his pieces had a superb and clear overall structure that is easy for the listener to follow."⁵³

A lawyer without a clear sense of how to structure an argument may leave his audience feeling confused or distracted. A dramatic example of such a failing is the lawyer who changes his theory of the case in the middle of the trial—arguing first that it was not his client on the videotape, and later that even if it was, his client didn't know the girl was a minor.

I was once involved in negotiating a merger agreement with a lawyer who kept changing melodies. When it suited his client's interest, he argued against a proposed contractual term on the grounds that it wasn't a part of the original agreement. Later, he insisted upon dramatic changes to the deal structure, and completely refused to see the force of his earlier arguments. Eventually, there was such a breakdown of trust and fair dealing that the transaction disintegrated.

☐ *Harmony*: When sounds are combined the result may be harmony.⁵⁴ Harmony is generally manifest in *chords* (combinations of notes that create a harmony), more specifically in *triads* (three note chords built up in thirds),⁵⁵ *inversion* (the transfer of the lowest note to some higher octave),⁵⁶ *dissonance* (sounds that embody "a feeling of clashing or of tension, which needs to be resolved"),⁵⁷

To see this image,
please refer to the printed
version of this issue.

Pablo Picasso, *Mandolin and Guitar*, 1924.

Solomon R. Guggenheim Museum, New York.

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The Lawyer as Writer

Associate Professor Brett G. Scharffs' research and writing regarding the legal profession have been drawing significant critical attention lately. Last June he was invited to present his paper "Law as Craft" at the Stanford-Yale Junior Faculty Forum. The forum is designed to bridge generations in legal academia by providing select, promising young scholars an opportunity to present papers and receive feedback from distinguished senior professors. The article was also the subject of a day-long work-in-progress workshop sponsored by the Institute for Humane Studies. "Law as Craft" appeared in the *Vanderbilt Law Review* last November.

Professor Scharffs' article is the first sustained comparison of law with other craft traditions such as carpentry, pottery, and quilting. Its thesis is that law—particularly adjudication—combines elements of what Aristotle described as practical wisdom, or *phronesis*, and craft, or *techne*. The article hints at elements of creativity in legal practice that are further explored in Part II of "The Lawyer as Composer."

"Law as Craft" is the third in a series of five articles Professor Scharffs is writing about adjudication and practical reason. The first, "The Role of Humility in Exercising Practical Wisdom," 32 U.C. Davis L. Rev. 127 (1998), uses the Old Testament prophet Micah's injunction to "do justly, and to love mercy, and to walk humbly with thy God" (Micah 6:8) as a springboard for arguing that humility, along with justice and mercy, is one of the most important character traits of judges. The second article, "Adjudication and the Problems of Incommensurability," 42 William & Mary L. Rev. 1369 (2001), explores the tools and resources that adjudication brings to bear on the problems of reasoning about complex, competing, incommensurable values. The final two articles in the series will address the significance of logical error in legal reasoning and the reasons why we prefer rules in some situations and judgment or balancing in others.

and *consonance* (smoother sounding chords that resolve a dissonance).⁵⁸ It is reported that Bach was "so fond of full harmony that, besides a constant and active use of the pedals, he is said to have put down such keys by a stick in his mouth, as neither hands nor feet could reach."⁵⁹

Harmony is also important in the law. For example, Peter Goodrich suggests that "euphony, harmony, and audibility were primary virtues of law and, as early constitutional lawyers were to put it, this musicality of governance lay at the source of the normative order that custom and law would become over time."⁶⁰ Principles of harmony are also relevant when we try to read two disparate statutes or cases, and we seek an interpretation that will create harmony and integrity between them. In most instances, lawyers will have an obligation to seek to harmonize cases in a way that the meaning and import of each can be preserved, even when urging that they may stand for propositions not previously recognized.

Much of the experience of being a first-year law student seems to involve learning about the various ways in which judges and lawyers try to harmonize a series of cases. During my first semester of law school, I often found myself bewildered and annoyed that what clearly appeared to be the holding of a case turned out to not dictate the outcome in the next case, and that some distinction that did not seem at all important in the earlier case became decisive in the next. Professor Kornstein cites former *New York Times* music critic Harold C. Schonberg, who as a child "realized that performers 'did' things to music—sometimes elegantly and convincingly, sometimes outlandishly and stupidly. It puzzled me that pianists could play the same work so differently."⁶¹ Kornstein notes that as "law students, we realized that judges and lawyers 'did' things to precedent—sometimes elegantly and convincingly, sometimes outlandishly and stupidly. It probably still puzzles most of us that judges and lawyers can read the same precedents so differently."⁶²

☒ *Additional Elements:* I believe that one way we as lawyers can critically reflect upon our effectiveness is to think about musical concepts such as rhythm, melody, structure, and harmony and ask ourselves whether we

utilize these constituents of composition well in our work. In addition to these elements, we may find a wide variety of other aspects of musical composition helpful in formulating and evaluating our work as lawyers: techniques such as the use of pitch,⁶³ volume and dynamics,⁶⁴ counterpoint and polyphony,⁶⁵ sequencing of homophonic passages,⁶⁶ color,⁶⁷ and parallelism.⁶⁸

THE PARADOXES OF COMPOSITION

What is the essence of composition? The composer Gustav Mahler once responded to an inquiry about how music is composed by responding, “Do you know how a trumpet is made? One takes a hole and wraps tin around it; that’s more or less what composing is.”⁶⁹

The futility of seeking to articulate the essence of composition is illustrated by a conversation between the Finnish symphonist Jean Sibelius and Mahler. Sibelius recalled, “When our conversation touched on the essence of the symphony, I said that I admired its severity and style and the profound logic that created an inner connection between all the motifs. . . . Mahler’s opinion was just the reverse, ‘No, the symphony must be like the world. It must embrace everything.’”⁷⁰

The craft of composition is not only difficult to articulate, it involves many contradictions and paradoxes. Composers both follow and break structural rules.⁷¹ In addition, a composer may either seek to build upon or to repudiate the past. During a rehearsal of music by Bach, conductor Paul Hindemith once requested that the string section play with “a more beautiful sound” where members of the section played staccato, absent vibrato and dynamic variation. The concertmaster of the renowned German Orchestra, however, insisted, “We descend from the Bach tradition and this is the style, the right way.”⁷² This rigid adherence to past traditions stands in stark contrast to a comment made by contemporary Franco-American composer Edgar Varèse, who once stated, “I refuse to submit myself to sounds that have already been heard.”⁷³ Law makes similar appeals to the past and to the virtues of innovation to justify favored outcomes.

We can also see the paradoxes of composition in the freedom and constraint experienced by a skillful composer. According to Schenker, “The musical genius is at once the

most law abiding yet freest citizen.”⁷⁴ For Schenker, “[t]he music of great composers is ‘unconfined, and is but lightly chained to the eternal laws of nature. They may be unaware of these laws, yet no living being can escape them.’” Alpern likens “Bach’s innate understanding of musical law,” to the “knowledge of a person who has the knack for doing the right thing in every situation without . . . even wondering if the statutes of the penal code might apply.”⁷⁵

Great composers such as Bach and Beethoven instinctively recognize that their creativity is safeguarded rather than confined by law. Thus, they are “grateful for this boundary, for it offers a necessary protection and control of freedom.”⁷⁶ An effective lawyer similarly will not feel constrained by the system of laws within which she operates. Rather she will be “lightly chained” to the laws, even when she is not explicitly aware of them, and such laws provide the boundaries within which she can exercise considerable creativity and freedom.

Composition exhibits personal style or even genius, and what makes one composer great may be very different from what makes another great. George Gershwin was forever seeking lessons from anyone he felt might improve his technical skills—from Ravel, Stravinsky, and many others. In Hollywood he became a friend and tennis partner of Schoenberg’s and duly asked the older composer to accept him as a pupil. Schoenberg refused. “I would only make you a bad Schoenberg,” he said, “and you’re such a good Gershwin already.”⁷⁷ Similarly, lawyers are most effective when they are true to themselves. Each of us must strive to discover and create our own approaches and styles as lawyers.

Perhaps the most brilliant and moving example of composing the law in the sense of seeing the world anew and mastering the tension between conformity and originality in the law is the example of Jesus Christ kneeling in the dust, drawing with a stick, acting as though he hadn’t heard them, while the Pharisees wait in their rage for His answer. “This woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned: but what sayest thou?”⁷⁸ Christ’s answer, of course, is not an answer at all; rather He responds with a better question, forcing

them to see things in a new light. “He that is without sin among you, let him first cast a stone at her.”⁷⁹ With that, He stooped down again and continued writing in the dirt.

THE HARDEST THING ON EARTH .04

In his speech to incoming law students, Dean Kronman warned, “Your ambitions will be challenged, confined, rebutted, and confused, and you will discover that nothing on earth is harder than to create something new. But never give up. Never concede. Never forget who you are. . . . You have a *duty* to create, and I know that you will meet it—I am completely confident you will—because I know you will never forget the pleasure in creation that drives your lives and that constitutes an essential part of what makes you happy.”⁸⁰ In looking to endeavors that are unquestionably creative, such as composing music, we can find ways to increase our creativity in our work as lawyers.

As lawyers, we will be better—not only at our jobs but as people—if we seek to cultivate the skills of a composer in our work. We can do this both by reflecting upon how the various aspects of composition apply in our professional lives, and by learning how to resolve the deeper paradoxes of composition.

In many surveys a distressingly large percentage of lawyers report discontent with their professional lives.⁸¹ If we are to find meaning in our vocation, it is up to us to find better ways to conceive and create understandings of what we are and what we ought to be doing. I sense in my own professional life that I will experience greater meaning and satisfaction if I consciously and reflectively seek opportunities to be a composer.

COMPOSING A LIFE

In addition, beyond our vocation as lawyers, in a very real sense, each of our lives is itself a composition, at least in large measure of our own making. Thus, what we can learn from a study of composition may have even deeper implications. In our quiet moments, we would do well to reflect upon what it is that we are composing.

- 1 Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.S.B.A., M.A. Georgetown University, B.Phil. Oxford University, J.D. Yale Law School. Thanks to Yvonne Blonquist and Chris Blonquist for their suggestions regarding the musical analogies, to my research assistants Matthew Bullock and Katherine Davidson, and to Jane Wise and Matthew Kennington for their editorial assistance.
- 2 Gordon B. Hinckley, *The Healing Power of Christ*, ENSIGN, Nov. 1988, at 54, 59.
- 3 RANDOM HOUSE COLLEGE DICTIONARY 276 (1972); See also MERRIAM WEBSTER COLLEGIATE DICTIONARY 236 (10th ed. 1994) (“to create by mental or artistic labor: produce” and “to formulate and write (a piece of music)”).
- 4 Bruce A. Ackerman, *Commencement Remarks*, YALE L. REP. Spring/Summer 1982, at 6.
- 5 Anthony T. Kronman, *The Character of Our Community, welcoming address to entering students at Yale Law School* (1997) (transcript available at Yale Law School).
- 6 See Wayne Alpern, *Music Theory as a Mode of Law*, 20 CARDOZO L. REV. 1459 n.4 (1999). Alpern observes that Henrich Schenker, “the leading music theorist of our time, perhaps of all time,” was a lawyer. *Id.* at 1459. Alpern notes that “Unlike other famous musicians who pursued law unenthusiastically or against their will, . . . [Schenker] devoted a substantial amount of time and energy to legal study.” *Id.* Schenker observed, “Let mankind observe in art the continuous natural growth of phenomena from the basis of a few principal laws, and learn to trust the power of growing outward from within more than the whims of that low plateau of humanity which believes it possible (or necessary) to create new laws with each new motion of hand or mouth.” HENRICH SCHENKER, 2 KONTRAPUNKT [COUNTER-POINT] xvii (John Rothgeb ed. & Trans., 1992), quoted in Alpern, *supra*, at 1482. Schenker could just as easily be speaking in defense of the organic growth of the common law. As Alpern notes, “As the proponents of historical jurisprudence believed of the laws of society, the laws of music for Schenker likewise evolved slowly and naturally from fundamental precepts rooted deep in its past and inherent in the structure of music itself.” *Id.* at 1481.
- 7 See e.g., DANIEL J. KORNSTEIN, KILL ALL THE LAWYERS? SHAKESPEARE’S LEGAL APPEAL (1994); MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995); RICHARD A. POSNER, LAW AND LITERATURE (rev. & enlarged ed. 1998); JAMES BOYD WHITE, THE LEGAL

IMAGINATION (1973). Ronald Dworkin has compared the judge to a chain novelist, who is constrained by two obligations: first, fidelity to what has come before (what Dworkin calls “fit”), and second, a duty to continue the story so as to make it the best it can be (what Dworkin calls “justification”). See RONALD DWORKIN, *LAW’S EMPIRE* 228–232 (1986). James Elkins notes that, “Lawyers are, by profession, storytellers: we relish a good tale and tell stories as a fundamental and functional part of our craft. Lawyers are enmeshed in stories, first as an audience for the stories of our clients and then as storytellers ourselves. We listen to client’s stories and retell them to judges and juries . . . We tell stories in legal briefs . . . We relish tales of other lawyers, stories of the impossible accomplished and awesome mastered . . . Lawyers are knee-deep in stories.” James R. Elkins, *From the Symposium Editor*, 40 J. LEGAL EDUC. 1,1 (1990).

8 The body of literature about the connections between musical composition or performance and the work of lawyers and judges is growing. Scholars of music and law recently met to discuss how music “might be seen as a legal process” and law as a “musical process.” *Symposium, Modes of Law: Music and Legal Theory—an Interdisciplinary Workshop*, 20 CARDOZO L. REV. 1325 (1999). Topics included: *The Score as Contract: Private Law and the Historically Informed Performance Movement*, *Music Theory as a Mode of Law*, *Fusion Folk: A Comment on Law and Music*, and *Origins of the Game Theory of Law and the Limits of Harmony in Plato’s Laws*. Earlier writers also explored the musical metaphor. See Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947); Richard Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

9 DANIEL KORNSTEIN, *THE MUSIC OF THE LAWS* 13 (1982). “For Kepler, as for the Pythagoreans almost 2,000 years earlier, the planets filled the air with celestial music, each planet singing its own tune.” *Id.*

10 *Id.* Kornstein continues, “The confusion is heightened by the increasing number and complexity of laws reaching into every corner of our lives.” *Id.* at 13–14.

11 *Id.* at 14. “The quest for such harmonies—the search for order out of chaos—may allow us to approach from a different perspective and with new sensitivity.” *Id.* But, Kornstein maintains, “to hear the ‘music of the laws’—to see the interconnectedness of apparently unrelated legal phenomena—we need something of Kepler’s Spirit.” *Id.* Kepler’s spirit is characterized by a passion for seeking understanding (“he wanted to grasp the structure of the universe”), boldness (“he had the audacity to conceive of law and order amid a jumble of phenomena”), creative genius (“at times coldly

rational, Kepler had a fertile imagination and triggered the conception of new theoretical systems”), and a willingness to fit theories to facts (“he sacrificed even his most beloved mathematical hypotheses when he saw that they did not fit observational data”). *Id.*

12 *Id.* at 18.

13 *Id.*

14 *Id.*

15 See, e.g., Timothy S. Hall, *The Score as Contract: Private Law and the Historically Informed Performance Movement*, 20 CARDOZO L. REV. 1589 (1999) (analogizing performance of musical work and performance of contract, and claiming interplay between performer and composer is cooperative or collaborative); Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1608, 1633–34 (1991) (identifying musical score as central and asserting “when one looks at any musical score, one is faced predominantly not with expression, but command,” but also maintaining that “The self-conscious search to regain and recapture . . . authenticity nevertheless produces inauthentic performance.”); Carol Weisbrod, *Fusion Folk: A Comment on Law and Music*, 20 CARDOZO L. REV. 1439 (1999) (critiquing notion of autonomy in law and music, and noting “that both build on previous material, official and unofficial, and that in both there are latitudes and boundaries, ways in which the interpreter is free and ways in which the composer is constrained.”). An early example is Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947) (comparing statutory interpretation with interpretation of music); Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921 (1948).

16 Notation makes possible the storage, reproduction, and distribution of a repertory of creative work. See STANLEY SADIE & ALISON LATHAM, *STANLEY SADIE’S MUSIC GUIDE: AN INTRODUCTION* 14 (1st ed. 1986) [hereinafter SADIE & LATHAM]. A system of notation will be successful insofar as it enables a reader of the text to discern how the composer intended the work to sound. In the standard Western musical system, pitch and duration are represented by notes on five-line staves of fixed pitch. *Id.* Similarly, the law has a system of notation, a language of its own.

17 Daniel Kornstein suggests that the “central link between music and law is interpretation.” KORNSTEIN, *supra* note 9, at 107. See also Daniel J. Kornstein, *Introductory Remarks: Panel on Politics, Symposium: Modes of Law: Music and Legal Theory*, 20 CARDOZO L. REV. 1331, 1331–32 (1999) (“An analogy exists between how musicians interpret musical scores and how lawyers and judges interpret statutes and constitutions. They all have the task of

- interpreting texts. Should musical performers follow a slavish literalism in reading music? Or is that the surest way to miss the composer's message? It is in essence the continuing fundamental debate in constitutional law over original intent versus a living document. Judges and lawyers are performers of legal music."); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947) (early notable entry in the law review literature relating musical and statutory interpretation). Frank compares legislatures to composers, and judges and lawyers to musical performers, and identifies common issues that arise in both interpretive contexts, including creative expansion and improvement ("There is a middle ground, between disregarding the composer's intention and being intelligently imaginative.") versus structure and fidelity to text (Purists insist that a performer should "engage in 'authentic interpretation' which eliminates the interpreter altogether, by 'the actual rendition' of the musical symbols just as they were written, in order to 'serve the true intention of the composer.'"). *Id.* at 1260–64. Karl Llewellyn, in contrast, rejected the musical metaphor. See Karl N. Llewellyn, *On the Good, the True, and the Beautiful in Law*, 9 CHI. L. REV. 224, 230 (1942) (expressing preference for metaphor of architecture).
- 18 KORNSTEIN, *supra* note 9, at 107.
- 19 NORMAN LEBRECHT, *THE BOOK OF MUSICAL ANECDOTES* 136–37 (1985).
- 20 Harold Schonberg notes, "Anybody engaged in recreating the bare, mysterious notes and markings of a composer necessarily has to bring his own ideas to them. . . . Notes have to be played, and it is the performer who has to be the intermediary between composer and listener. Music, then, is a reflection, an interpretation of the mind of the composer expressed through the mind of the performer." *Cited by* KORNSTEIN, *supra* note 9, at 108. Kornstein observes that with slight alteration this passage could have been written about the legal process, and might read: "Anyone engaged in applying the bare, mysterious words of a legislator or a judge necessarily has to bring his own ideas to them. . . . Words have to be interpreted, and it is the lawyer or judge who has to be the intermediary between legislator and citizen. Law, then, is a reflection, an interpretation of the mind of the draftsman expressed through the mind of the lawyer or judge." *Id.*
- 21 *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934) (Learned Hand, dissenting).
- 22 This concept was articulated by Professors Farmer and Williams at a BYU Law School faculty retreat in December 2001, and is the subject of a paper they are currently writing. See also K. Anders

Ericsson, *The Acquisition of Expert Performance: An Introduction to Some of the Issues*, in *THE ROAD TO EXCELLENCE: THE ACQUISITION OF EXPERT PERFORMANCE IN THE ARTS AND SCIENCES, SPORTS AND GAMES* 1–50 (K. Anders Ericsson, ed., 1996); J. A. MOON, REFLECTION IN LEARNING AND PROFESSIONAL DEVELOPMENT (2000); D. A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

- 23 *Id.*
- 24 I believe it is more than accidental that while child prodigy musical performers are rather commonplace, child prodigy composers are much rarer. Even performance prodigies often lack depth and emotional range. Composer prodigies such as Mozart are so extraordinary for their level of genius that it is difficult to imagine the more prosaic of us having much if anything to learn from them.
- 25 I am indebted to John Durham Peters for his thinking about the relationship between perfection and creativity.
- 26 "A good [appellate] brief requires much work before pen is even set to paper. . . . There are myriad techniques. Only by experimentation can you determine what best suits your craftsmanship." HERBERT MONTE LEVY, *HOW TO HANDLE AN APPEAL* § 6:1 (4th ed. 2000).
- 27 "At the beginning of the opening statement, the mood is set, the theme is expressed, and the jurors become involved in the real-life drama of the facts and circumstances of the case. . . . In many cases, the first two minutes of the opening statement are the most critical minutes of the entire trial." PETER PERLMAN, *ANNOTATED OPENING STATEMENTS* 1, 3 (1994). The music theorist Johann Mattheson (1681–1748), who studied law, "interpreted music as a form of oral advocacy governed by the rules of rhetoric, the cornerstone of legal study since the days of Quintilian and Cicero." Alpern, *supra* note 6, at 1499–1500.
- 28 "[The lawyer] cannot easily remove his witnesses or jurors from the courtroom and bring them to a location in which his argument would be more persuasive. Nonetheless, a litigator can accomplish the same feat by mastering the art of storytelling. In his opening arguments to the jury, or with his foundational questions to a witness, the skillful litigator can weave the facts of the case into a setting; he can lift the jurors and witnesses from their seats and take them where he wishes them to be. He can maintain this effect by continuing to deepen his story as he develops his case, distancing his listeners from facts which may negatively influence them while bringing them to the heart of his argument." Susan E. Kinz, Note, *Love's Litigation: Plato's Phaedrus as Trial by Jury*, 46 DUKE L. J. 815, 823 (1997).

- 29 Vladimir Lenin is supposed to have said: "Trust is good, but control is better." Jeffrey S. Busch & Nicole Hantusch, *I Don't Trust You, But Why Don't You Trust Me? Recognizing the Fragility of Trust and Its Importance in the Partnering Process*, DISP. RESOL. J., Aug.–Oct. 2000, at 56, 58. However, with the assistance of able and honorable lawyers, it seems possible for parties to achieve a mutually satisfactory measure of both. In the area of labor relations, for example, where parties are notoriously divided and distrustful, lawyers "who are knowledgeable about nuances of [the] collective bargaining relationship can be among the most effective dispute resolvers and are often able to lead parties away from divisiveness and frustration." Carlton J. Snow, *Building Trust in the Workplace*, 14 HOFSTRA LAB. & EMP. J. 465, 504 (1997). However, Professor Snow is at the same time critical of many lawyers who "severely undermine the prospect of a trusting relationship" between labor and management by the use of traditional competitive and adversarial methods. *Id.* at 504.
- 30 SADIE & LATHAM, *supra* note 16, at 14.
- 31 *Id.*
- 32 *Id.*
- 33 Certain 20th-century composers, in their efforts to redefine music and sound, may disagree with Sadie's analysis of music as organized sound. In particular, John Cage created a piece containing no organized sound. In his work 4'33, "the performer sits or stands as if to play but nothing is heard, except the environmental sounds and any audience reaction. These, in Cage's view, have quite as much value as anything he might propose in their place: the function of the artist becomes that of pointing people towards the potential art surrounding them in life." SADIE & LATHAM, *supra* note 16, at 408." This is not unlike the Critical Legal Studies movement within the legal academic community, which has as its main objective to "develop a consciousness-based critique of the existing legal order." Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1563 (1984). This effort, seeks to "critically reexperience the phenomena of everyday life with an eye to illuminating their hidden meanings." *Id.* Cage, like the critics, strives to force his audience to think and listen outside the traditional classical box.
- 34 SADIE & LATHAM, *supra* note 16, at 26.
- 35 *Id.* at 11.
- 36 *Id.* at 17.
- 37 The beat is the "basic pulse underlying mensural music, that is, the temporal unit of a composition." 3 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 20 (Stanley Sadie ed., 2001) [hereinafter NEW GROVE DICTIONARY]. "Part of the coherence

of almost any piece of music lies in the fact that it rests upon a succession of regularly spaced impulses, or beats, against which the rhythmic patterns play, and in relation to which, as to one another, they enter into coherent form . . . Beats fall into groups, or measures, often of the same length throughout a given piece or movement.” WALLACE BERRY, *FORM IN MUSIC* 2 (2d ed. 1986). “To determine the beat of a passage you are listening to, tap your foot to the music or try to imagine the way a conductor would conduct the passage.” KOSTKA & PAYNE, *TONAL HARMONY: WITH AN INTRODUCTION TO TWENTIETH-CENTURY MUSIC* 25 (1st ed. 1984).

38 *Id.* Tempo markings are “words and other instructions in musical scores used to define the speed and specify the manner of performance.” 25 *NEW GROVE DICTIONARY*, *supra* note 37, at 271. Frequently composers employ one or two Italian words, indicating the speed at which a piece is to be played, ranging from *largo* (very slow), to *adagio* (slow), to *andante* (walking), to *allegro* (fast), to *presto* (very fast). Since the 19th century, tempo markings have become more elaborate and, with the invention of the metronome, more precise. KOSTKA & PAYNE, *supra* note 37, at 25.

39 *Id.*

40 SADIE & LATHAM, *supra* note 16, at 21.

41 *Id.* at 22.

42 *Id.* at 23.

43 ERIN LEWIN ALTSCHULER, *BACHANALIA: THE ESSENTIAL LISTENER’S GUIDE TO BACH’S WELL-TEMPERED CLAVIER* 34 (1994). Altschuler exaggerates his point, coining the word “motivicness” to describe the way Bach organized his music. “Motivicness means that the motive, or theme, of any piece by Bach is in every measure of that piece, not just in some measures, or in a lot of measures, but in every measure, and also that there is hardly anything else *but* the motive in any measure of any piece by Bach.” *Id.*

44 *Id.*

45 According to Sadie, “Second in importance to melody is key.” “[M]ost western music has a strong gravitational pull towards a tonal center.” SADIE & LATHAM, *supra* note 16, at 60. In addition, composers “cause their music to modulate, or change key, in the course of a movement, usually to one or more of the keys nearly related to the principal one of the movement—that is, to keys which have many notes in common with the principal key.” *Id.*

46 There are a variety of ways in which harmony is used in the structure of a movement. “Composers of the Baroque period, for example, often based an entire movement on a fixed, recurring pattern of harmonies (much like twentieth-century jazz, with its sponta-

neously improvised melody and rhythm but pre-arranged harmonic sequence).” SADIE & LATHAM, *supra* note 16, at 61. Kostka and Payne maintain that “[t]he grammar of tonal harmony has some similarities to spoken language, but it is not quite so well understood,” and suggest that “we might draw an analogy between chord functions and parts of speech.” KOSTKA & PAYNE, *supra* note 37, at 181.

47 “Composers develop subtle ways of handling modulation to convey structural meaning—for example, by modulating to very remote keys to create a sense of distance from the home key, or by changing key rapidly to bemuse the listener.” SADIE & LATHAM, *supra* note 16, at 61. Modulation is a “firmly established change of key, as opposed to a passing reference to another key.” 16 *NEW GROVE DICTIONARY*, *supra* note 37, at 876. According to Kostka and Payne, a “modulation is a shift of tonal center that takes place *within* an individual movement.” KOSTKA & PAYNE, *supra* note 37, at 279. Kostka and Payne also note that “[a]lmost all compositions from the tonal era begin and end in the same key. Sometimes the *mode* will be changed, usually from minor to major, but the *keynote* (tonic note) remains the same.” *Id.*

48 A cadence is “the conclusion to a phrase, movement or piece based on a recognizable melodic formula, harmonic progression or dissonance resolution.” 4 *NEW GROVE DICTIONARY*, *supra* note 37, at 778. “The use of cadences—punctuation points, or resting points—can mark out the formal outlines of a movement for the listener.” SADIE & LATHAM, *supra* note 16, at 61. Cadences also convey a “sense of closure or interruption in the rhythmic motion of the musical line.” BERRY, *supra* note 37, at 8.

49 ALTSCHULER, *supra* note 43, at 28. Altschuler marvels that Bach composed “over 200 hours of music, almost all of it excellent,” as well as at least another 50 hours of music Bach wrote down but which has been lost. *Id.* at 33. “In order to compose so many [at least 2400 different] movements, especially with all his other responsibilities, I think Bach must have had a general method for composing pieces and movements so he wouldn’t always be reinventing the wheel. I think he used a three-step compositional process: 1. He found or invented an excellent theme. 2. He filled the piece on the small level with the theme and hardly anything else but the theme. 3. He carefully planned the overall structure of the piece.” *Id.*

50 *Id.* at 28. The relationship between structure and fidelity to rules is expounded nicely by Altschuler’s answer to the question, “What happened to fugues after Bach?” One type of fugue written after Bach, Altschuler labels “academic fugues,” which have been “written by lesser composers and music theo-

rists.” *Id.* at 218. The trouble with academic fugues, Altschuler explains, “is that they are composed under the belief that fugues must adhere to a large set of technical and complex rules. For example, it was thought that a fugue should have a certain amount of stretto [a section of a fugue in which more than one voice is running an entry at the same time], beginning at a certain place in the fugue, and a certain number of entries and a counterexposition at a preassigned spot in the fugue. Adherence to all these rules can make academic fugues sound dry, complicated, stiff, and boring. In contrast to the many rules of academic fugues, Bach used only a handful of general rules when writing his fugues. Within those few rules he exercised immense creativity and flexibility.” *Id.* at 218. Wayne Alpern asks, “Doesn’t the fugue imply the composer’s submission to rules? And is it not within those structures that he finds the full flowering of his freedom as a creator?” Alpern, *supra* note 6, at 1502. Alpern also cites Leonardo da Vinci in support of the proposition, “Strength is born of constraint and dies in freedom. Insubordination boasts of just the opposite and does away with constraint in the ever-disappointed hope of finding in freedom the principle of strength. Instead, it finds in freedom only the arbitrariness of whim and the disorders of fancy. Thus, it loses every vestige of control.” *Id.*

51 Kornstein analogizes the evolution of legal principles in the common law to the development of musical themes in a fugue. “The fugue starts with a theme based on a particular rule of law as sung by a particular judge. While the theme is still being sung, a second judicial voice modifies the first legal rule and introduces a secondary theme—a countersubject—which provides contrasts to the subject. As modifications of the legal rule occur, each judicial voice enters in turn, singing the theme, often accompanied by the countersubject in some other voice.” KORNSTEIN, *supra* note 9, at 18–19. “The legal fugue—the play of principle and counterprinciple, the dialectic of theme and countertheme—fits neatly into the common law process. It shows how a confusing chorus may still be singing a basic theme.” *Id.* at 19.

52 ALTSCHULER, *supra* note 43, at 35.

53 *Id.*

54 Harmony is the “combining of notes simultaneously, to produce chords, and successively, to produce chord progressions. The term is used descriptively to denote notes and chords so combined, and descriptively to denote a system of structural principles governing their combination.” 10 *NEW GROVE DICTIONARY*, *supra* note 37, at 858.

55 Kostka and Payne explain that “tonal harmony makes use of *tertian* (built of 3rds) chords. The funda-

mental tertian sonority is the *triad*, a three-note chord consisting of a 5th divided into two superimposed 3rds.” KOSTKA & PAYNE, *supra* note 37, at 39.

56 *See id.* at 44.

57 SADIE & LATHAM, *supra* note 16, at 28.

58 *Id.*

59 CHARLES BURNLEY, A GENERAL HISTORY OF MUSIC, *quoted in* LEBRECHT, *supra* note 19, at 19.

60 Peter Goodrich, *Operatic Hermeneutics: Harmony, Euphantasy, and Law in Rossini’s Semiramis*, 20 CARDOZO L. REV. 1649, 1653–54 (1999). Goodrich continues, “The allusion to music as the best rhetoric and to harmony as the proper or proportionate relation of law to justice gains numerous further elaborations in works that endeavor to set out the relation between the parts and the whole of civil and political society.” *Id.* at 1654.

61 KORNSTEIN, *supra* note 9, at 107–08.

62 *Id.* at 108.

63 In music, pitch is the “particular quality of a sound (e.g. an individual musical note) that fixes its position in the scale. 19 NEW GROVE DICTIONARY, *supra* note 37, at 793. “Pitches are named by using the first seven letters of the alphabet: A, B, C, D, E, F, and G.” KOSTKA & PAYNE, *supra* note 37, at 3. For a lawyer, striking the right pitch, knowing how high or how low to go in making one’s point, can be critical. In speaking, one can vary the pitch of one’s voice, enabling one to keep the interest of judge or jury. More significantly, a skillful lawyer will have a sense of where to pitch his argument, how high on the argumentative register to strike a chord.

64 Important messages are communicated by volume in music. Sudden dynamic contrasts between loud and soft as well as carefully controlled crescendos and diminuendos in music punctuate important climaxes. Lawyers, likewise, must be attentive to volume, both in the manner in which they use their voice, and also the intensity with which they try to make a point. Like a composer of music, a lawyer may add a jarring note in order to make sure her audience is still awake.

65 “Much music . . . consists of melody with accompanying harmony. But much, too, consists of melodic lines that are heard against one another and are woven together so that their individual notes harmonize.” SADIE & LATHAM, *supra* note 16, at 29. The intertwining of independent melodic lines is known as polyphony and is most apparent in the contrapuntal music of the Baroque period, for example the fugues of J. S. Bach. Carol Weisbrod suggests that in the law polyphony can be found in majority and dissenting opinions. Weisbrod, *supra* note 15, at 1447; Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist*

Jurisprudence, 24 GA. L. REV. 985 (1990). *See also* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2288–95 (1989); Elizabeth P. Hodges, *Writing in a Different Voice*, 66 TEX. L. REV. 629, 640 (1988).

66 A sequence is “a melodic or polyphonic idea consisting of a short figure or motif stated successively at different pitch levels, so that it moves up or down a scale by equidistant intervals . . . Sequences can be used in the construction of a melody or theme itself, but they usually function in the spinning out of musical material by developing a motif related to a previously stated melody.” 23 NEW GROVE DICTIONARY, *supra* note 37, at 107. “Sequences are an important means of achieving unity in tonal music.” KOSTKA & PAYNE, *supra* note 37, at 107.

67 Composers can create variety in their music by the use of various means such as texture, rhythmic character, speed, key structure, color, and dynamic level. Different instruments will have different tone colors, and a composer can utilize these differences including voice (both male and female), strings (violin, viola, cello, double bass), plucked instruments (guitar, lute, harp), keyboard instruments (piano, harpsichord), wind instruments (recorder, flute, oboe, bassoon, clarinet, saxophone, organ), brass (cornet, horn, trumpet, trombone, tuba), and percussion. Lawyers likewise need variety in their voicing and expression to emphasize different points in oral argument.

68 KOSTKA & PAYNE, *supra* note 37, at 458. Parallelism is the simultaneous movement of all voices within a chord in the same direction. It is also commonly known as planning. Parallelism is a means of forcing the listener’s ear away from the tonal center and often facilitates modulation to a new tonal center. *Id.*

69 NATALIE BAUER-LECHNER, ERINNERUNGEN AND GUSTAV MAHLER (1923), *quoted in* LEBRECHT, *supra* note 19, at 248.

70 KARL EKMAN, JEAN SIBELIUS, THE LIFE AND PERSONALITY OF AN ARTIST (1935), *quoted in* LEBRECHT, *supra* note 19, at 271.

71 “Every piece of music, from the simplest song to the most elaborate symphony needs to have some kind of organization, or form.” SADIE & LATHAM, *supra* note 16, at 59. From the beginning of time, each new generation of composers has sought to define its own system of structure by breaking the regulatory bounds of its predecessors and forming its own rules. For example, Debussy relaxed the harmonic tensions of tonic and dominant traditional harmonies through his use of dissonance and block chords, and Arnold Schoenberg replaced the structure of tonality that created major and minor

relationships around a single key with 12-tone serialism. DONALD JAY GROUT & CLAUDE V. PALISCA, A HISTORY OF WESTERN MUSIC 693 (5th ed., W. W. Norton & Co. 1996) (1960).

72 ROBERT JACOBSON, REVERBERATIONS (1976), *quoted in* LEBRECHT, *supra* note 19, at 317.

73 *Id.* at 310.

74 Alpern, *supra* note 6, at 1494.

75 *Id.*

76 *Id.* at 1495. Alpern also notes with interest that Igor Stravinsky, a notable composer of the 20th century, and Schenker, a notable 20th-century theorist, both studied law. *Id.* at 1501. “More striking is that each describes the same dialectic between order and freedom in similar legal imagery. In his *Poetics of Music*, Stravinsky quotes G. K. Chesterton’s juristic remark, ‘rigidity that slightly yields, like Justice swayed by Pity, is all the beauty of earth.’ The notion that musical freedom and constraint temper one another is central to Stravinsky’s neoclassical aesthetic. ‘It is a fact of experience, and one that is only seemingly paradoxical,’ he stated, ‘that we find freedom in a strict submission.’” *Id.* at 1502 (citations omitted).

77 LEBRECHT, *supra* note 19, at 319 (quoting author’s interview with Nuria Schoenberg-Nono).

78 *John* 8:4–5 (King James).

79 *John* 8:7.

80 Kronman, *supra* note 5, at 12.

81 *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (May 1999). Professor Schiltz cites an extensive array of studies and surveys, which indicate that lawyers “are in remarkably poor health and quite unhappy.” *Id.* at 873, 874–888.

ART CREDITS

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submitted by Jane H. Wise, instructor of legal writing and editor of the **Clark Memorandum**

snapshots

The first legal-writing assignment for first-year students is a short essay on anything they want to write about. For writing instructors, it's a "heads up" on the students' abilities in grammar, punctuation, and sentence structure. The gift, of course, comes in the snapshot of that former life that knew not law school. Here are some of the best from the fall of 2001.

Illustrations by Jon Flaming

ANDREW CLAWSON

"I'm so glad to be back," she whispers, speaking softly, as though being alone in a bed together in her parents' house is still against the rules. "Me too," I whisper back, as we snuggle before falling asleep after a long day of airplanes, holiday crowds, and layovers. "It feels like we've been away forever." "I love you," she mumbles, half asleep. "I love you too. Good night." "Good night."

"Ooooooh! Ooooooh!" I wearily open my eyes to find Natalie hunkered down by the side of the bed retching into a large cooking pot. I rush to her: "Are you okay?" "Drew," she moans, "pleeease make it stop! I can't dooo it anymore. I've woken up four times now and there's nothing left in my stomach. I *bate* throwing up! Dooo something."

"Why don't I get you some Seven-Up," I suggest. "Maybe that will settle..."

"No!" she wails. "I can't dooo it anymore. Pleeease, just make it stop." I try again: "Well, maybe you could eat some soda crackers so that your stomach isn't empty..."

"No! Just dooo something," she says, cutting me off again. I stand up to think if there's anything else I can do, and impatiently she tells me to get her mom.

"I'm not going to get your mother for you," I reply sharply. We've only been married for seven months, and she'll think that I can't take care of you. "Pleeease!" she whimpers. "I'll pay you to get my mom."

Convinced that I've failed as a husband, I tiptoe up the stairs to my in-laws' bedroom door to get Freda. "Freda! Freda!" I call weakly, half-hoping that she doesn't hear. "Natalie's sick and she wants you."

Defeated, I sit with Natalie as her parents come into the room. "What's going on?" asks Freda. "Natalie's sick," I begin to say as Natalie interrupts: "Mom, Pleeease

do something. I'm sooo sick and I can't take it anymore." Freda kneels down next to Natalie and gently tucks a tangled strand of blonde hair behind Natalie's ear. "Drew," Freda says without looking up, "why don't you go into the kitchen and bring me some Seven-Up and soda crackers. Maybe that will settle her stomach."

The moaning stops. I smile.



CAROLYN E. HOWARD

The main motivation behind my coming to law school is the desire to buy a boat. There is nothing better than waking up at six in the morning, grabbing a swimsuit, and heading for the lake. It seems that every time I water-ski, I get better, but always on a neighbor's or generous friend's boat. Most girls are looking for a tall, dark, handsome man, but I'm just looking for a slim, fast, good-looking boat.

Because practicing law runs in my family, I've spent some time watching courtroom trials. The lawyers are always dressed in sharp suits, brightly colored ties, shiny shoes, and sparkly watches. They move about the courtroom with ease, their heads held high, looking like they have a plan. I'm not too quick with math, but I know how to put two and two together. Those sharp suits weren't bought at Kmart, and the lawyers were most likely planning fantastic boating trips. I had found my destiny. There was, in fact, a boat in my future: a boat through law school. Law school would provide opportunities for me to find work with income that would exceed my food bill. That boat is on its way.

CAMERON REESE

Three weeks ago, following a four-month engagement, I got married. I love being married. I did not love being engaged. To me, engagement was akin to a form of purgatory where the eternities were delayed in deference to important decisions like dish towels and napkin rings. I've since realized that despite engagement's frustrations, it was a necessary and important step in preparing me for marriage.

Law school, I believe, will be much like an engagement. And although I understand

the necessity of law school training, I've been told by enough 2L's and 3L's that the first year "isn't that bad" to believe it must really be "that bad." Fortunately my engagement has equipped me with some of the principles necessary to survive my first year.

I learned quickly my engagement would require sacrifice. But my engagement required much more than the sacrifice of time; it required the sacrifice of ESPN. The male freedom I clung most tightly to prior to my engagement was the right to watch *SportsCenter* at both 11 o'clock and midnight. Engagement signaled the end of this freedom. Instead of watching *SportsCenter*, my time was spent stuffing envelopes and walking through Provo's slums, which the BYU Web page creatively labeled married housing.

My engagement also taught me the importance of having an opinion. My wife and I registered at a couple of local stores, and as a good husband should, I accompanied her on most of these trips. The trips taught me that "I don't know" or "I don't care" are not correct responses when asked an important question like "Which beach towels should we register for?" or, better yet, "Which garbage can do you like?"

However, I quickly learned my opinions were not wanted for actual advice. When shared, they were usually followed by "What do you think about these?" which meant my answer was wrong.

Similarly, the opinion-sharing exercise should be helpful during my first year in law school. When I'm asked to share my opinion in class, I'll know two things: First, that "I don't know" is not an appropriate response when asked what I think about a case. Second, my opinion is important to the extent it proves I'm not as smart as I thought I was. When my opinion is destroyed by a professor, I can thank my engagement for teaching me not to be offended.

But the most important thing my engagement taught me is that the wait is worth it. Seeing my wife when I get home is much more exciting than seeing my five roommates and their girlfriends. I'm confident the law school wait will also prove worth it. And, if I'm lucky, it won't be "that bad."



DONLU THAYER

"I can't go to law school," I said, collapsing after our daughter's fairy-tale reception-in-the-park two weeks ago. "Look at this house! Look at this yard!" To an onlooker my husband explained my *modus operandi* as wife/mother/friend/teacher/editor/gardener/musician in a word: "volcanic." My brain insists that everything I can conceive must be done. I work in a frenzy until I drop. The cells of my body confer: "She's dying! Hold onto everything you've got!" For six months before the wedding I tried desperately (again) to lose something of the 75 pounds I had gained between 1975 and 1984 over the course of six pregnancies. My son-in-law's mother is a thin South African blonde. I had already suffered the humiliation of being the fattest person in my son's wedding pictures two years ago in Calgary, and that summer I had managed to lose 35 pounds. This summer, with more and better effort, I lost a mere 15. At the wedding luncheon I surrendered. After months of no sugar, no wheat, no dairy, I defiantly consumed three desserts.

"Go to law school, dear," my husband said. "You need focus. Otherwise you tend to get all used up." A psychotherapist friend once said I possessed rescue energy sufficient to save the known universe. It wasn't a compliment. "It's not your job," he said.

So, my children are grown and my husband needs to retire. I need a better job, and I need a new focus. Besides, in law school, I won't have time to eat.

Three alumni of the J. Reuben Clark Law School have been called by the First Presidency of the Church to serve as mission presidents. Their wives and some of their children have joined them for the three-year service.

The new presidents are Wilford Wayne Andersen, '76, Mexico Guadalajara Mission; D. Gary Beck, '82, Philippines Manila Mission; and Lawrence E. Corbridge, '76, Chile Santiago North Mission.

Wilford Wayne Andersen, '76, was managing partner of Andersen Investments in his hometown of Mesa, Arizona, when called to preside over the Mexico Guadalajara Mission. His previous Church callings include stake president, bishop, and ward Young Men president.

President Andersen and his wife, Kathleen (Bennion), the parents of nine children, are joined by their five youngest sons in Guadalajara. Their other children include a son currently in his third year at the Law School, two daughters, and a son serving a mission.

Having served in the Argentina South Mission, Wilford completed his bachelor of science degree at BYU before receiving his law degree with the first graduating class of the J. Reuben Clark Law School in 1976. He worked in the legal department of the Bank of America in Los Angeles prior to his return to Mesa, where he started up Andersen Investments.

Reflecting on his blessings, President Andersen says, "I've learned that we need the Lord's help and that when we do our best, He will make up the difference and help us to accomplish His purposes."

New Mission Presidents Include Law School Alumni

D. Gary Beck, '82, retired this past June as a U.S. Coast Guard captain and deputy commander, Maintenance and Logistics Command Pacific. The former bishop and stake mission president resided with his wife, Marsha (Garside), and family in San Rafael, California, prior to his call as president of the Philippines Manila Mission. The Becks have four children, including a son currently serving in the Chile Santiago North Mission.

Born and raised in Magna, Utah, President Beck earned a bachelor of science degree at the U.S. Coast Guard Academy in 1972. He has served in the Coast Guard throughout his career, primarily in legal capacities, and earned his law degree at BYU through the Coast Guard post-graduate education program. A Coast Guard law specialist and past military judge, he taught law at the U.S. Coast Guard Academy in New London, Connecticut.

"My priorities are God, country, and family—which are all connected. My career



Clockwise from left: President and Sister Wilford Wayne Andersen; President and Sister D. Gary Beck; and President and Sister Lawrence E. Corbridge.

has allowed me time to serve as a husband and father and in the Church. All of these avenues of service have grounded me in those priorities."

Lawrence E. Corbridge, '76, a senior attorney at Corbridge Baird & Christensen in Salt Lake City, is joined by his wife, Jacquelyn (Shamo), and the two youngest of their five sons as he serves as president of the Chile Santiago North Mission. The Corbridge's other three sons are all returned missionaries like their father, who served in the Argentina North Mission from 1968 to 1970.

After earning a bachelor's of science degree from BYU, Larry graduated with the first class of the Law School.

Within a few years he had teamed up with John Baird, '78, and Jim Christensen, '79, to form Corbridge Baird and Christensen. (John Baird is currently serving as mission president of the Puerto Rico San Juan Mission.)

A past stake president, bishop, and Gospel Doctrine teacher, President Corbridge acknowledges: "I have always been in over my head since the first day of law school and throughout the intervening years of practice and Church service. I have learned that my capacities are never sufficient and that success depends essentially on a power infinitely greater than my own. I especially feel it now."



Kristin Gerdy: More Honors

Librarians (AALL) work when she was asked to help design a new lawyering skills program for the J. Reuben Clark Law School in 1997. The new program was implemented in 1998, and Kristin, in addition to being a busy librarian, became a research and writing instructor.

Kristin's efforts did not go unnoticed. She was invited to Temple University's Law School as a visiting associate professor in their writing and research pro-

gram for 1999–2001. Meanwhile, BYU's program—now the Rex E. Lee Advocacy Program—was losing its first director, Monte Stewart, to the governor's office, and Kristin was invited to become the new director in 2001.

In June 2002 Kristin was named to the Association of Legal Writing Directors Board (ALWD), the youngest member to serve in that capacity. In 2000 the board introduced the *ALWD Citation Manual*, the only competitor

to the *Bluebook*. She is filling a vacancy left by Tom Blackwell, a legal-writing professor gunned down by a student at Appalachian School of Law in the fall of 2001.

In addition to her new ALWD duties, Professor Gerdy is the senior co-chair of the ALWD and Legal Writing Institutes' Survey Committee, and she just finished her term as chair of the publications committee for AALL. Her book with Jan Levine, a manual for computer use for law students, is being published by Aspen Law & Business and will be out this year.

G. Murray Snow Named to Arizona Court of Appeals

Arizona Governor Jane Dee Hull named G. Murray Snow, '87, to the Arizona Court of Appeals on June 5, 2002. He joins Daniel Barker, '81, on the bench.

Before his appointment Snow specialized in civil litigation with the firm of Osborn Maledon in Phoenix, representing clients in insurance, contracts, and trade-secret litigation. He is a member of the Ethical Rules Review Group appointed by the Arizona State Bar Board of Governors to draft revisions to the Rules of Professional Conduct. Snow has also taught



constitutional law in the Political Science Department at Arizona State University.

At Brigham Young University, Snow was editor in chief of the *Law Review*, earned a Special Faculty Merit Award, and was named to the Order of the Coif.

"Mr. Snow brings both an excellent legal mind and years of experience practicing law in the courts," said Governor Hull. "I appreciate his willingness to serve."

Kelly Reeves and Tim Critchlow: New Development for the Law School



Kelly Reeves, previously a private sector business development and corporate accounts manager, has been hired by LDS Foundation to assist the Law School as a new director of Development. Reeves will work with Tim Critchlow, '87, who has been working with BYU's business school and BYU-Hawaii in development and now adds the Law School to his client list. Together they will form a team in building relationships between the Law School and its supporters.



Lola Wilcock,
Admissions
Director, Retires

Lola Wilcock has been director of Admissions at J. Reuben Clark Law School since 1976—the year of the first graduating class. In that time she has shepherded almost all the admittees to the Law School through the application process and has worked with four associate and administrative deans, including H. Reese Hansen, now the dean of the Law School. Mrs. Wilcock will retire September 30, 2002.

“I will miss the people I work with and the students the most,” said Mrs. Wilcock. “The people have always been wonderful, and the students have been just great. I started here typing out acceptance letters in triplicate and have seen everything go computerized, but the students are still the same.”

Lola Wilcock, a recipient of the Law School Distinguished Service Award, has seen applications go from 285 in 1976 to 861 in 2002.



John Snyder

Remarks to the Law School Community on September 11, 2002

H. REESE HANSEN / DEAN OF THE LAW SCHOOL

The book of Revelation tells us that Christ will take away our sorrows. Last September 11th we could scarcely visualize such liberation. We grieved individually, as families, and as a nation and may have been tempted to despair. Nevertheless we were uplifted by ties forged in joint suffering.

As members of a community of faith, we could see the hand of God in daily acts of kindness, service, and compassion. As members of a community of hope, we looked forward to a world perfected and cleansed of evil. No one could remain unmoved by the heroism of frontline workers at Ground Zero. We were enriched as loving and compassionate people reached out to those deprived by the misguided belief that man can make an acceptable offering to God using evil and terror. As members of a community bonded together by charity, the pure love of Christ, we have a pattern to follow in turning September 11th from a time of darkness to an opportunity to reaffirm the love and compassion of our Lord and Savior Jesus Christ.

The essence of the Atonement is the spiritual alchemy by which evil is turned to good. I invite you to take a moment now and more time in the near future to ponder how you can purify your heart and thoughts. To accept the Atonement of Christ, we must abandon hate and recrimination. We must make our object in life the continued process of sharing God's gifts with others.

In addition, as lawyers we have a particular obligation to recognize the dignity of each of God's children and to prevent revenge from superceding justice. Due process and equity are not just legal requirements—they are spiritual mandates.



Carolyn Stewart
Honored by University

Carolyn Stewart—known to every J. Reuben Clark Law School graduate—was presented with BYU's prestigious President's Appreciation Award in March 2002.

Carolyn was hired by Rex E. Lee, new dean of the yet-to-be-opened Law School at BYU. With eight years of experience serving the dean at the University of Utah's College of Law, she soon became a key figure in the administration of the new BYU Law School. Over the years Carolyn has served four deans: Rex Lee, Carl Hawkins, Bruce Hafen, and H. Reese Hansen.

Her direct duties involve the management of the administrative apparatus of the Law School, including oversight of the operating budget, staffing and faculty employment, and building scheduling.

Perhaps more important, she is universally admired and respected by the nearly 4,000 graduates of the Law School and by the entire Law School community. Her steady and reliable management have made a tremendous contribution.

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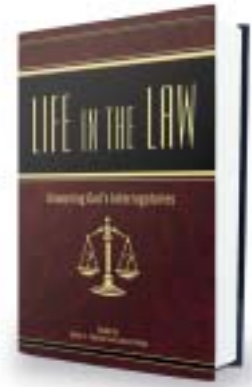
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Awards Applaud Clark Memorandum



FEATURE SPREAD FROM SPRING 2001 ISSUE
EDITORIAL ILLUSTRATION BY GARY KELLEY

The outstanding graphic design and content of the *Clark Memorandum* has once again attracted the attention of three national organizations.

The Salt Lake City Chapter of the American Institute of Graphic Arts (AIGA) recognized the spring 2002 issue of the Law School's alumni magazine as one of the 100 best pieces of design and advertising during the past year.

Print Magazine included two recent feature spreads in its Regional Design Annual 2001. "Duty to Rescue," published in the spring 2001 issue, and

"The Doctrine of Religious Freedom" in the fall 2001 issue were chosen for design excellence. In addition the Council for the Advancement and Support of Education (CASE) presented the *Clark Memorandum* with a gold medal for the feature spread "The Doctrine of Religious Freedom."

These prestigious honors acknowledge the efforts of a team including Scott Cameron, former editor; Kathy Pullins, associate dean of the Law School; Jane Wise, editor; Joyce Janetski, associate editor; David Eliason, art director; and Bradley Slade, photographer.



Tricia Fitt recreates the Olympic torch run in front of the Law School, which took place on February 5, 2002. On that date she ran the torch in Parowan, Utah, hours before it reached the Law School. Tricia is the wife of Richard Fitt, formerly the Law School's development officer.

Clark Memorandum

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